

BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guyhicks@bellsouth.com

2005 OCT 28 PM 4:24

October 28, 2005

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

VIA HAND DELIVERY

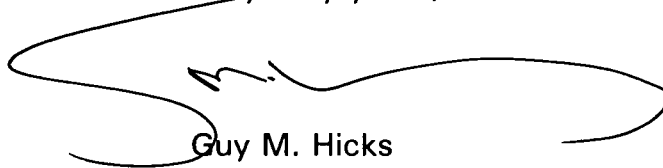
Hon. Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition to Establish Generic Docket to Consider Amendments to
Interconnection Agreements Resulting from Changes of Law*
Docket No. 04-00381

Dear Chairman Jones:

Enclosed are the original and four copies and a CD ROM of BellSouth's Post-Hearing Brief. Copies of the enclosed are being provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection
Agreements Resulting from Changes of Law*

Docket No. 04-00381

BELLSOUTH TELECOMMUNICATIONS, INC.'S
POST-HEARING BRIEF

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INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") petitioned the Tennessee Regulatory Authority ("TRA" or "Authority") to open this docket following the issuance of *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied*, *NARUC v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004), as a generic proceeding to address the changes in law resulting from these significant federal developments.¹ The specific changes in law that BellSouth seeks to effectuate are those resulting from the Federal Communications Commission's ("FCC") rules adopted in its *Triennial Review Order*² and *Triennial Review Remand Order*.³ From the beginning, CLECs sought to delay these changes. The CLECs opposed the opening of the docket and sought to dismiss it. CompSouth filed a motion to dismiss the BellSouth petition on November 11, 2004. SECCA and the Joint CLECs joined in the motion. They opposed the implementation of clear federal deadlines. For example, refusing to accept the FCC's clear statement of national policy that the UNE-P regime was over, a number of CLECs filed motions for emergency relief.⁴ They filed appeals in an effort to avoid operating under the new guidelines and national policy adopted by the FCC. All of these efforts were done to avoid or delay the FCC's decisions.⁵ The CLECs' efforts to delay or derail this

¹ See *Order Opening Generic Docket and Appointing a Hearing Officer*, entered February 8, 2005

² Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied, NARUC v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004)

³ Order on Remand, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel Feb 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*")

⁴ *Motion for Emergency Relief*, September 25, 2005, 04-00381, *MCI Motion for Expedited Relief Concerning UNE-P Order*, March 2, 2005, 04-00381

⁵ A number of CLECs that initially opposed these changes have since withdrawn from this docket in whole or in part. For example, KMC Telecom V and KMC Telecom III withdrew prior to the hearing. See June 28, 2005, *Order Approving Withdrawal*. DeltaCom recently agreed to withdraw all of its witnesses' testimony from the

proceeding speak volumes about their unwillingness to do business in the manner the FCC – following the dictates of Congress and the federal courts – has pronounced.

While many of the CLECs who originally participated in this docket to oppose BellSouth have now entered into commercial agreements,⁶ those still participating continue to fight at all costs to avoid the changes the FCC has prescribed.⁷ Consistent with their campaign of delay and contrary to the purpose of this docket, the CLECs have attempted to circumvent federal law by proposing that the TRA adopt contract language that does not accurately reflect the FCC's decisions in the *TRO* and *TRRO*. Instead, their language would perpetuate the very same outdated regulatory regime, that the FCC discarded, and would maintain network elements for which the FCC has determined there is no impairment. To support their position, the CLECs continue to rely on arguments that the FCC, federal courts, and the majority of state commissions already have considered and rejected – most notably, that a state commission can and should dictate the rates, terms, and conditions of BellSouth's Section 271 obligations.

The TRA has stood ready to act in response to the *TRO* now for a long time. As a result of the *USTA II* decision and the *TRRO*, the path for state commissions has taken several turns since 2003. Now, some two years after the *TRO*, it is time for the TRA to implement the important decisions that the FCC has made. This is where the *TRO* and *TRRO* “rubber” hits the road, and the TRA must act to implement the changes the FCC has prescribed.

evidentiary record, with the exception of Jerry Watts' testimony regarding Issue 31. See October 20, 2005 letter from Guy Hicks Birch Telecom also withdrew from the docket See July 13, 2005 letter from Henry Walker

⁶ BellSouth's witness Kathy Blake testified that Bellsouth has entered into over 150 commercial agreements through which BellSouth satisfies its Section 271 switching obligation. Some of CompSouth's member companies are cited in this number (Gillan Deposition, at 66, Hearing Exhibit 4, April 29, 2005 letter from Guy Hicks.) CompSouth witness Gillan acknowledged this fact during the hearing See *Tr Vol I*, p 89 In addition, over 98 CLECs in Tennessee have amended or entered into new Section 252 interconnection agreements that reflect the new unbundling rules and which remain subject to state commission oversight *Tr Vol I*, at 52

⁷ Indeed, three of CompSouth's member companies – Access Point, Inc., IDS TelCom, and LecStar Telecom, Inc. have not responded to Bellsouth's repeated requests for negotiation See BellSouth's October 14, 2005 response to the TRA's Data Requests, Item 1(e)

The changes ordered by the FCC are substantial. Today, as a matter of binding federal law, the *TRO* and the *TRRO* eliminate (or confirm the elimination of) any obligation on BellSouth to provide unbundled access for local circuit switching, certain DS1 and DS3 loops and transport, fiber to the home and fiber to the curb (collectively, “FTTP”) loops, hybrid copper-fiber for broadband purposes, entrance facilities, line sharing, dark fiber loops, certain dark fiber transport, and virtually all call-related databases. In the *TRRO*, the FCC expressly prohibited CLECs from obtaining new arrangements for the UNEs eliminated by that order (*i.e.*, mass market switching) as of the effective date of the order, March 11, 2005. For each of these former UNEs, the *TRRO* established a transition period of 12 months (18 months for dark fiber) from March 11, 2005, for moving the embedded base of elements de-listed by the *TRRO* to alternative arrangements, and it established new, transitional rates for embedded base UNEs effective as of March 11, 2005.⁸ The CLECs are well aware of the FCC’s decisions and have had ample time to prepare for this transition.

The starting and ending dates of FCC’s mandatory transition plan does not depend on any particular contract terms. Consequently, none of BellSouth’s interconnection agreements had to be amended before implementation of the FCC’s prohibition (“No New Adds”) on new orders for de-listed UNEs at the start date of the transition period – March 11, 2005. Throughout BellSouth’s region, however, the CLECs fought that inevitable conclusion to the point that court intervention was necessary in some states to effectuate the law.⁹ In Tennessee, the CLECs

⁸ *Id*

⁹ See *BellSouth Telecoms Inc v MCI Metro Access Transmission Servs LLC*, 2005 U S Dist LEXIS 9394 (N D Ga Apr 5, 2005) (“*Georgia No New Adds Order*”), *aff’d BellSouth Telecoms, Inc v MCIMetro Access Transmission Servs, LLC*, 2005 U S App LEXIS 19819 (11th Cir Ga, Sept 15, 2005) (“*11th Circuit Order*”) In Tennessee, NuVox and Xspedius appealed the Authority’s “No New Adds” order on September 23, 2005, but recently filed a motion to hold their appeals in abeyance. See Joint Motion to Place Action in Abeyance, filed in federal court in Nashville, Docket No 3 05-CV-0742 No other CLECs in Tennessee have challenged the Authority’s “No New Adds” order

fought hard to delay implementation of that prohibition, but the TRA ordered that the FCC's clear deadline would stand, over the opposition of several CLECs.¹⁰

Now, seven months later, the time when the parties must effectuate the FCC's transition period's mandatory ending date is fast approaching, and the battle continues. The ending date of the transition period is just as important as the starting date, and the Authority must act promptly to avoid another round of emergency motions next Spring.

Proper implementation of the transition plan, and of all of the remaining unbundling limitations, is of critical public policy importance. CLEC rhetoric predicting diminished competition is flatly contradicted by the FCC's findings. The FCC and courts undeniably have found that overbroad unbundling obligations have hindered the innovation and investment that results from sustainable facilities-based competition.¹¹ Thus, while the CLECs claim the sky will fall if the changes mandated by the FCC take place, the FCC has already decided otherwise. Far from agreeing with the Chicken-Little rhetoric, the FCC concluded that it was necessary to de-list UNEs to promote real competition. The CLECs have tried to obscure these important legal and regulatory policy decisions, but, in affirming the *Georgia No New Adds Order*, the Eleventh Circuit Court of Appeals hit the nail on the head when it explained that "CLECs are clinging to the former regulatory regime in an attempt to cram in as many new customers as possible before they are forced to bow to the inevitable"¹²

Just as CLECs attempted to circumvent the starting date of the transition period, so too are they attempting to improperly extend the ending date of the transition period by advancing arguments that would effectuate an unlimited transition period and that would simply replace the

¹⁰ July 25, 2005 *Order Terminating Alternative Relief Granted During April 11, 2005, Deliberations*, 04-00381

¹¹ See, e.g., *TRRO* ¶¶ 2, 8 (citing to *United States Telecom Ass'n v. FCC*, 290 F.2d 415 (D.C. Cir. 2002) ("*USTA I*"), 218 – 221

¹² See *11th Circuit Order*, at *13

rejected federal regulatory scheme with an identical state regulatory scheme, under the guise of Section 271. To the extent existing interconnection agreements perpetuate such out-dated obligations that the FCC eliminated in the *TRO* and *TRRO*, those agreements must be revised – finally – to reflect federal law. To that end, BellSouth has proposed contract amendments that accurately implement the requirements of Section 251 of the 1996 Act and the FCC’s implementing rules adopted in the *TRO* and the *TRRO*.¹³

ISSUE BY ISSUE ANALYSIS

I. 271-Related Issues (Overview of Issues 8, 14, 17, 18, 22)

The most contentious, and the most important, issue between the CLECs and BellSouth involves the interplay between Section 271 and de-listed UNEs. This is the common theme for all five of the 271-related issues discussed in Section I of this brief.

Stated simply, the CLECs have developed their argument as a way to coax state commission to ignore the FCC’s national policy decisions and continue the discredited UNE-P regime. The CLECs’ proposed contract language and testimony seek to perpetuate UNE-P at a price at least as favorable as they previously had, if not a better price.¹⁴

¹³ BellSouth requests in this proceeding that, in the Authority’s order, it approve *specific contractual language* that can be promptly executed by BellSouth and the CLECs (subject to the individual carrier negotiations, as applicable) While the Authority may need to address policy matters and issue statements of policy in doing so, it is important that this proceeding end with actual contract language in place BellSouth stands ready to assist the Authority in doing so, to the extent that staff or any party requires Microsoft Word versions of BellSouth’s Pre-Filed Testimony of Pamela Tipton, Exhibits PAT-1, 2, and 5. BellSouth will furnish copies of these documents upon request (indeed, BellSouth has previously furnished CompSouth with soft copies of its exhibits in its ongoing efforts to narrow through negotiations the issues to be resolved by the Authority)

¹⁴ Gillan Deposition, Hearing Exhibit 4 at 68 in this deposition, Mr Gillan claims that, because CompSouth is willing to agree to “interim” 271 rates that are consistent with the transitional rates set in the *TRRO*, he is not actually advocating lower Section 271 prices than Section 251 prices This is simply unbelievable, given that “interim” rates, in the normal sense, are subject to later true up, and Mr Gillan’s belief is that a Section 271 price could be lower than a Section 251 price. Thus, even if the Authority accepted Mr Gillan’s testimony (it should not) and applied its “interim” rate from Docket No 03-00119 here, it would not foreclose CompSouth from seeking a lower rate at some unspecified future date As BellSouth explains herein, it vigorously opposes the expansion of the “interim” rates set in Docket No 03-00119 here

In fact, the CLEC's witness and consultant (and the likely architect of the entire 271-based campaign to retain UNE-P), Mr. Gillan, has been blatant in his contention that, no matter what the FCC has done, the CLECs should be able to keep UNE-P forever. A talented witness, however, Mr. Gillan tried to sidestep when asked on cross examination whether the CLECs actually contend that they are entitled to get, through 271 back-door, exactly what the FCC had eliminated:

Q. Okay. Now, Mr. Gillan, you have testified – and in fact one of the documents I passed out to you was some testimony you had filed with the Authority before in the TRO cases. Do you have that, sir? It's just an excerpt. It's your surrebuttal testimony from the state TRO cases.

A. Yes.

Q. And in that testimony it's your position that there's a UNE-P – I'm paraphrasing – but a Section 271 UNE-P *indefinitely*, sir?

A. Let's call it UNE Prime. (emphasis added).¹⁵

Even Mr. Gillan appears to be wary of destroying his credibility by suggesting (in person, rather than in his written TRO testimony) that the CLECs should retain UNE-P forever, so he tries to hide the absurdity of the position by calling UNE-P by another name. With apologies to Mr. Shakespeare, a UNE-P “by any other name” still smells like a de-listed UNE from the FCC's perspective.

Mr. Gillan also attempts to create confusion by suggesting that BellSouth's own counsel had suggested that there is a 271 obligation to provide UNE-P.¹⁶ BellSouth's counsel is, not surprisingly, being misquoted. Mr. Lackey's actual statement was about the obligation regarding unbundled switching and BellSouth's willingness to provide a commercial product.¹⁷ In fact,

¹⁵ Gillan Cross, *Tr* Vol IV at 89

¹⁶ *Id*

¹⁷ March 20, 2004, Transcript of Proceedings, Dockets 03-00491, 03-00526 and 03-00527, at 18-19

that is exactly what BellSouth is doing today through commercial agreements with other CLECs – just as the FCC intended.

The entire 271-based argument is nonsense, and would completely undermine the FCC’s prior policy findings about the damage the UNE-P has done to competition. Consequently, even if the TRA had the jurisdiction to address the 271 issues or establish “271 rates” sought by the CLECs, the TRA should stick with the FCC’s decision to end UNE-P – not undermine that decision by creating a surrogate for that rejected regime. The bottom line is that, even if the TRA *could* do as the CLECs urge (which it cannot legally, as discussed below), it *should* not, for all the same legal, factual, and policy reasons that compelled the FCC to end the UNE-P regime. The TRA should keep in mind that this is not an academic or theoretical discussion about the TRA’s jurisdiction. Rather, the CLECs (and their paid consultants) have concocted this argument in order to minimize the impact of the *TRO* and *TRRO*. Accepting the CLECs’ position would place the TRA squarely at odds with the FCC’s decision to *change* – not *perpetuate* – the regulatory nature of the telecom market in order to incent real, facilities-based competition.

Further, the FCC, federal courts, and the majority of state commissions all recognize that the law does not permit a state commission to compel the inclusion of section 271 network elements (and thereby dictate the rates, terms, and conditions applicable to section 271 network elements) in a section 252 interconnection agreement. Similarly, a state commission cannot legally mandate that BellSouth include network elements pursuant to state law authority in section 252 interconnection agreements.

With respect to each of the 271-related issues, the CLECs have argued that the TRA’s 2-1 decision in the DeltaCom case establishing an interim switching rate supports their argument

that the TRA may assert jurisdiction over 271 elements. Their reliance on that case is overreaching.

First, the DeltaCom case addressed the issue of the market rate for unbundled switching when it is not required by 251. BellSouth argued that the “market rate” is the negotiated rate to which DeltaCom had agreed previously. DeltaCom, arguing based on the “just and reasonable” standard applicable to 271 elements, sought a lower, cost-based rate analogous to the UNE rate, asserting that the Authority should ignore the “market” in market-rate and instead mandate a rate. The Authority deliberated the issue on June 21, 2004 when Director Tate made the following comments and motion:

DIRECTOR TATE: I have thought through this a lot, but in order to, I think, be true to my requests and my philosophies about market-based rates, what I would like to propose is – because from my reading of the record, the only rate that has ever been negotiated was the \$14 rate, and I would propose that we accept that, that we continue the present rate on an interim basis and subject to true up or true down as the case might be. And I believe I said on an interim basis until this Authority or the FCC or there is another rate negotiated by the parties. I believe that that would be most consistent with my previous request by the parties and my philosophy regarding market-based rates.¹⁸

After further deliberations, Director Miller asked Director Tate to consider amending her motion to accept, instead of the negotiated rate, the DeltaCom proposed rate as an interim rate. Importantly, Director Miller noted that his approach was based on the fact that these issues were subject to further development at the federal level, noting:

DIRECTOR MILLER: I believe this approach to keep negotiations ongoing in light of – this is the best approach to keep negotiations ongoing in light of the continued uncertainty at the FCC. In addition, I believe this approach will allow all interested parties to have input into the final rate adopted, and since it’s impossible to predict either what will happen or when it will happen, assigning an interim rate will provide ITC DeltaCom with some level of relief and certainty while the true up will ensure that the current negotiation – negotiating position of

¹⁸ Transcript of Proceedings, Monday, June 21, 2004, Docket No 03-00119, In Re Petition for Arbitration of ITC DeltaCom Communications, Inc , with BellSouth Telecommunications, Inc , page 3, lines 9-21

the parties remains intact, neither benefiting nor penalizing either party through the establishment of an interim rate.¹⁹

While Director Tate did not agree to the motion to the extent it set a rate other than the negotiated rate, Directors Miller and Jones agreed, in a 2-1 vote, to set an interim rate based on DeltaCom's FBO.²⁰ BellSouth, believing that Director Tate's view was the correct approach and consistent with the FCC's rulings and policy, has sought FCC pre-emption. The FCC has not yet acted on BellSouth's petition.

Nearly one year after the DeltaCom case, the issue of "271 jurisdiction" to set rates under the just and reasonable standard again arose – this time in the efforts of CLECs seeking to avoid the FCC's deadline for adding new UNE-Ps ("No New Adds" deadline). Again, CLECs argued that the Authority should act pursuant to 271 to require BellSouth to continue providing new UNE-P to CLECs after the FCC's deadline. Initially, the TRA, on a 2-1 vote, ordered some alternative relief in an attempt to further negotiations. Director Kyle dissented from that decision, and specifically rejected the CLECs' 271 theory saying:

DIRECTOR KYLE: Both Cinergy and MCI assert that section 271 of the Federal Act independently supports the right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the agreement. Therefore, they argue that even if BellSouth were empowered by the *TRRO* to unilaterally change their rights to obtain UNE-P pursuant to section 251(c)(3), BellSouth would not be entitled to change the unbundling and UNE rate sections of their agreements unilaterally. In addition, MCI argues that BellSouth must continue to provide UNE-P under Tennessee law. I disagree. In my opinion, Section 271 of the Federal Act does

¹⁹ Transcript of Proceedings, Monday, June 21, 2004, Docket No. 03-00119, In Re Petition for Arbitration of ITC DeltaCom Communications, Inc., with BellSouth Telecommunications, Inc., page 6, lines 17-25 to page 7, lines 1-5.

²⁰ The TRA has not yet convened a generic docket on a permanent rate, and the DeltaCom order is the subject of an FCC petition to preempt. This illustrates the fallacy of CompSouth's position – to the extent the TRA established an "interim" rate in DeltaCom, Mr. Gillan suggests the TRA can just extend that interim rate to the entire CLEC community. See Gillan Rebuttal at 35. The TRA's initial "interim" rate would soon mushroom into something that doesn't resemble anything "interim" at all. In addition, although Mr. Gillan suggests that BellSouth has prevented him from suggesting permanent rates (Gillan Rebuttal at 35), that certainly did not prevent him from filing an FCC affidavit on behalf of one of his member companies in which he recommended a higher Section 271 rate than the Authority's interim Section 271 rate which further illustrates the absurdity of his position. *Tr. Vol. IV* at 86-87.

not allow a network element obtained pursuant to that section to be combined with any other 251 UNE. Section 271(c)(1)(B) contains the competitive checklist that specifies the network elements that are required to be provided by ILECs to CLECs. The list includes local loop transmission unbundled from local switching or other services, local transport unbundled from switching or other services and local switching unbundled from transport, local loop transmission or other services. Clearly, these network elements are to be provided unbundled from other services or network elements. The FCC did not require that these elements be made available combined with other services or elements. While I believe BellSouth is required to provide section 271 network elements to CLECs, BellSouth is only required to provide them at rates that are just and reasonable and unbundled from other services and network elements. Therefore, BellSouth is not required to provide combinations of 271 and 251 elements pursuant to paragraph 584 of the *TRO*.²¹

The following month, the TRA considered the situation again, as the negotiating period established by the majority's alternative relief order was due to expire. At that time, the majority found that the alternative relief had not resulted in a negotiated solution and should end and specifically ordered that:

Effective May 16, 2005, BellSouth is no longer required to provide New Adds and may reject any and all new orders for the de-listed UNEs, including new orders to serve the CLECs' embedded base of customers.²²

Director Kyle did not vote for the *Order* because she had opposed the earlier "alternative relief"; however, taking both orders together, it is clear that every member of this panel voted to implement the FCC's No New Adds deadline, over the CLECs' 271-based objection.

Together, these decisions demonstrate that the TRA has not already adopted the policy of acting under 271 in the fashion the CLECs suggest. Instead, it is clear that the TRA in this very

²¹ Dissent of Director Sara Kyle to Order Granting Alternative Relief, Docket No 04-00381, *In Re BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, pages 2-3 (footnotes omitted)

²² Order Terminating Alternative Relief Granted During April 11, 2005 Deliberations, Docket No 04-00381, *In Re BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, at 4

docket has already correctly rejected precisely the same 271-based argument when it ruled that BellSouth was no longer required to provide new UNE-P adds.²³

The DeltaCom case does not represent the dispositive precedent the CLECs cast it to be. The decision was not unanimous and one of the two votes in favor of setting the interim rate was made in clear recognition of the potential for further development on the issue at the federal level. *Importantly, the very CLEC who sought and obtained that interim rate ruling – DeltaCom – has withdrawn its testimony in this case, with the exception of Mr. Watts’ testimony on Issue 31.*

In short, the DeltaCom case does not mandate that the TRA accept the CLECs’ position on 271. Rather, the No New Adds decision and Director Kyle’s dissent from the earlier alternative relief order demonstrate that the TRA has already rejected that position.

Even after it was rejected in the context of the No New Adds issue, CompSouth and other CLECs in this case seek to perpetuate the Section 251 unbundling regime under the guise of Section 271. In exact contrast to the language of Director Kyle quoted above, the CLECs erroneously contend that BellSouth must include Section 271 “combination” or “commingling” obligations or state law unbundling obligations in interconnection agreements that are arbitrated before, filed with, and approved by state commissions and thereby continue providing de-listed UNEs under the terms of those agreements.

It would be exceedingly odd for all of the FCC’s decisions, deliberations, and conclusions about the adverse impact of the de-listed UNEs on competition to be rendered moot by reference to 271. Yet that is exactly what the 271 argument is all about – ignoring the FCC’s national policy. This disregard for the law renders the CLECs’ proposed interconnection

²³ Order July 25, 2005, Docket 04-00381

agreement language on each of the 271-related issues fatally flawed, and the Authority must summarily reject such terms.

- A. **Issue 8(a):** *Does the Authority have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?*

Relevant Contract Provisions: PAT-1 Section 1.1 and PAT-2 Section 1.1 (limiting BellSouth's unbundling obligations to those that BellSouth offers to CLECs in accordance with BellSouth's obligations under Section 251(c)(3) of the Act).²⁴

1. **State Law**

The Authority need not expend significant resources analyzing the theory of state law unbundling because no CLEC presented testimony supporting the contention that BellSouth has state law unbundling obligations that are different from federal unbundling obligations. Indeed, in Georgia, the CLECs made clear that they were "not requesting" the Georgia Commission to exercise state law authority in a parallel proceeding there.²⁵ As discussed above, the Authority has already seen and rejected this argument when it was raised in the context of the *Emergency Motion* on No New Adds. It should be likewise rejected here.²⁶

2. **Section 271 – Summary of Argument**

Faced with the FCC's decision that the UNE-P regime was not providing the right incentives for real facilities-based competition and should be end, the CLECs have scrambled to find a way to avoid the consequence of that decision. Stated simply, they will say anything to continue to get UNE-P as if nothing has changed. The 271 argument is their attempt to do just that. It is a blatant end run attempt to avoid the FCC's decision to de-list UNEs. If there were

²⁴ For ease of reference, BellSouth uses the exhibit identifiers noted in Ms Tipton's pre-filed testimony in this brief because those references were used in communications and discovery throughout the region.

²⁵ See October 21, 2005 Joint CLEC Post-Hearing Brief, filed in Docket No 19341-U

²⁶ *Dissent of Director Kyle to Order Granting Alternative Relief*, July 13, 2005, 04-00381, *Order Terminating Alternative Relief*, July 25, 2005, 04-00381

any merit to the notion that all the changes the FCC created in the *TRO* and *TRRO* could be wiped away or ignored by reference to a federal law – a law with which the FCC is intimately familiar – then the FCC would surely have saved itself the trouble of all of its work on these issues. The 271 argument is nothing more than a last ditch effort to obtain from the state commissions what the CLECs were unable to obtain from the FCC and federal courts. The argument should be met with a high degree of skepticism because it seeks to render the FCC’s work on UNEs in the *TRO* and *TRRO* meaningless.

Not only is the 271 argument at odds with the FCC’s ultimate and underlying decisions about impairment and competition, it is also unpersuasive as a matter of statutory interpretation. The CLECs’ argument on Section 271 starts with language contained within Section 271, which refers to agreements under Section 252. From that reference, the CLECs concoct an argument that *presumes* that because state commissions arbitrate and approve **Section 251** obligations in the context of a Section 252 agreement, they must take similar steps concerning Section 271.

This argument cannot withstand logical scrutiny because, although Section 271 refers to Section 252, the simple fact is that Section 252 explicitly *limits* the rate-setting and arbitration powers of state commission to **Section 251** elements. This express limitation precludes the Authority from requiring BellSouth to include Section 271 elements in a Section 252 agreement.

The Authority cannot read one portion of the statute but ignore the remainder as the CLECs do. Section 252 never refers to Section 271, yet it contains express references to Section 251. Although the CLECs ignore this express limitation (“[i]t is immaterial that § 252 does not refer to § 271 ...”),²⁷ the Authority cannot. There is no statutory authority for state commission

²⁷ *Joint CLECs’ Response to BellSouth’s Motion for Summary Judgment*, filed in Docket No 04-00381, July 1, 2005, p 8 (“*CLECs’ SJ Response*”)

Section 252 rate-setting, negotiation, arbitration, and approval process over Section 271 obligations, and the Authority must adhere to the federal law limitations.

It is not as if the FCC just forgot about 271. Rather, the FCC discussed its role on these issues in the *TRO*, explaining that

[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry ***that the [FCC] will undertake*** in the context of a BOC's application for [S]ection 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6).²⁸

Indeed, when the FCC first addressed the interplay between section 251(c) and the competitive checklist network elements of section 271 in its *UNE Remand Order*, it FCC was very clear that “the prices, terms, and conditions set forth under sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of section 271.”²⁹ The FCC has also stated that, once long distance authority has been granted, “[S]ection 271(d)(6) grants the Authority enforcement authority to ensure that the BOC continues to comply with the market opening requirements of [S]ection 271.”³⁰ The FCC made no mention whatsoever of a state commission role in this process; the regulatory agency charged with Section 271 oversight is the FCC.³¹

²⁸ *TRO* ¶ 665 (emphasis added)

²⁹ *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 469 (1999) (“*UNE Remand Order*”), petitions for review granted, *Unites Telecom Ass’n v FCC*, 290 F.3d 415 (D.C. Cir. 2002), cert denied, 123 S. Ct. 1571 (2003). The Commission very clearly stated that

[i]f a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in Section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a)

UNE Remand Order at 470

³⁰ *TRO* ¶ 665

³¹ See also *TRO* at ¶ 663 (“The Supreme Court has held that the last sentence of section 201(b), which authorized the [FCC] ‘to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,’ empowers the [FCC] to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996. Section 271 is such a provision”) (citations omitted)

The weight of authority confirms that the FCC, and not state commissions, has exclusive oversight over Section 271 obligations. Federal courts in Kentucky, Mississippi, and Montana, and state commissions in Alabama, Idaho, Iowa, Kansas, Massachusetts, Minnesota, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Washington have addressed Section 271. These decisions have all concluded, in some fashion, that the FCC is charged with Section 271 authority. Despite this authority (indeed, despite the FCC's guidance in the *TRO*), the CLECs' primary witness claims the *only* way that BellSouth can satisfy its Section 271 obligations is through a state approved interconnection agreement or an SGAT.³² This claim is flatly contradicted by federal and state commission decisions.

As noted above, the CLECs continually return to the TRA's 2-1 decision in the DeltaCom case to set an interim rate for switching in the DeltaCom Arbitration last year, but Director Kyle's statements on No New Adds and Director Tate's statements in the DeltaCom deliberation cut to the heart of the matter. The FCC has set a clear course toward market rates negotiated by companies and away from traditional, old-style rate-making by state commissions. The CLECs' 271 argument is intended to reverse that course. If accepted by the TRA, the 271 argument would result in CLECs leaving the negotiating table and heading instead to the commissions to resurrect the very rate-making from which the FCC has turned away.

Finally, the CLECs' proposed contract language and positions must be reconciled with reality. The FCC has explained that unbundling at cost-based rates is only required in situations where CLECs are genuinely impaired without access to particular network elements. When unbundling is not required it means that a market is "suitable for competitive supply" and means also that "competition is possible" without access to UNEs.³³ Likewise, courts have recognized

³² Gillan Deposition, Hearing Exhibit 4, pp 60 – 61

³³ *USTA II*, 359 F 3d at 571

that unnecessary unbundling imposes costs.³⁴ In practical terms, the CLECs' positions and proposed language in this proceeding simply extend the transitional pricing of the *TRRO* indefinitely, and retains all other terms and conditions for de-listed UNEs.³⁵ However, where unbundling is not required, and Section 271 access is required, the terms of independent Section 271 access are imposed under "less rigid accompanying conditions."³⁶ De-listing means that CLECs can and should compete using alternative, market-based arrangements, rather than under a state-imposed Section 271 regime that is designed to mirror the Section 251 framework, which is what CompSouth advocates. As Director Kyle noted in her motion on the No New Adds issue,

[a]ction of this sort would introduce unnecessary delay into a process the FCC intended to move more swiftly. Such delay would do nothing more than hinder the rapid advancement of facility-based competition the FCC intended.³⁷

After more than a decade of synthetic competition, the Authority must ensure that the transition to sustainable facilities based competition is unhampered by CLEC created hurdles aimed at extending indefinitely a specified transition period. BellSouth explains more fully below each of these points.

³⁴ *Id.* at 572, *USTA I*, 290 F.3d at 428

³⁵ CompSouth's witness, Mr. Gillan, is quite explicit on this point, claiming "the Commission should require that § 271 offerings should be identical – except as to price – to the § 251 offerings they replace." Gillan Direct at 48. Concerning price, Mr. Gillan alleges that § 271 prices are "potentially" different. *Id.* at 4. CompSouth glibly suggests that the Authority's interim prices in DeltaCom could serve as "interim" § 271 pricing, until an undetermined future time, relying on a Missouri Order that is the subject of an active appeal in federal district court. See *Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. Missouri Public Service Commission*, Case No. 4:05-CV-01264-CAS, United State District Court, Eastern District of Missouri. Setting aside the numerous deficiencies with Mr. Gillan's arguments, BellSouth does not agree that "interim" Section 271 rates are either legitimate or acceptable. In this regard, the Ninth Circuit vacated and remanded a district court order that denied Verizon's preliminary injunction request to set aside interim TELRIC rates in *Verizon Cal., Inc. v. Peevey*, 413 F.3d 1069 (9th Cir. 2005). Moreover, the Authority lacks authority to set such rates as explained herein.

³⁶ *TRO* at ¶ 658

³⁷ *Motion* at 2

3. **Issue 8(a): There Is No Legal Basis For A State Commission To Force BellSouth to Include Section 271 Network Elements In A Section 252 Interconnection Agreement.**

Conspicuously absent from the “testimony” of CompSouth’s lay witness (or from CompSouth’s prior legal briefs on this topic) is any acknowledgement that state commissions’ authority to arbitrate Section 252 agreements is limited *to ensuring the contracts comply with Section 251*. That is because, pursuant to the Act, when BellSouth receives “a request for interconnection, services, or network elements *pursuant to Section 251*,” it is obligated to “negotiate in good faith *in accordance with Section 252* the particular terms and conditions” of agreements that address those Section 251 obligations. Thus, interconnection agreements address Section 251 obligations, and those obligations are the *only topics that are required to be included in a Section 252 interconnection agreement*. The resulting Section 251/252 agreements are submitted to state commissions for approval under Section 252(e). A state commission’s authority is explicitly limited to those agreements entered into “pursuant to Section 251” and, when arbitration occurs, state commission’s must ensure that agreements “meet the requirements of Section 251.”³⁸

Consequently, upon receiving a request for “network elements pursuant to section 251,” an ILEC may negotiate and enter into an agreement voluntarily, or an ILEC may enter into an agreement after compulsory arbitration.³⁹ An ILEC is *not required*, however, to negotiate, in the context of a Section 252 agreement, any and all issues CLECs may wish to discuss, such as access to elements ILECs may be required to provide under Section 271. Without doubt, an ILEC may voluntarily agree to negotiate things that would normally be outside the purview of its Section 251 obligations. When it does so, such matters may properly be considered by the state

³⁸ 47 U.S.C. § 252(e)(2)(B)

³⁹ 47 U.S.C. § 252(a), (b)

commissions under prevailing law. However, where an ILEC chooses not to negotiate more than is required by Section 251, that is its right, and it cannot be forced to do more. BellSouth has steadfastly refused to negotiate the inclusion of Section 271 elements in Section 252 agreements and there was no testimony or record evidence that suggested otherwise here. Consequently, the interconnection agreement amendments that result from this proceeding must be limited to Section 251 obligations.

The law is quite clear that Section 251 obligations form the basis of Section 252 agreements. As the Eleventh Circuit has recognized, “The scheme and text of [the Act] ... lists only a limited number of issues on which incumbents are mandated to negotiate.”⁴⁰ The Fifth Circuit also recognized this distinction, explaining that “[a]n ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to § 251 and 252.”⁴¹ Congress did not grant state commission any authority to arbitrate compliance with the requirements of Section 271. That decision resolves this issue – state commissions have authority to arbitrate Section 252 agreements, but only so far as such agreements comply with Section 251. Neither the CLECs nor the Authority can force BellSouth to include Section 271 obligations in Section 252 agreements.

4. **Issue 8(a): Section 252 Limits State Commission Rate-Setting Authority to Section 251 Elements.**⁴²

The CLECs’ purpose in arguing for the TRA to engage in 271 rate-setting is to avoid precisely what the FCC has set in motion – a move away from commission rate-making and

⁴⁰ *MCI Telecom Corp et al v BellSouth Telecommunications, Inc at al*, 298 F 3d 1269, 1274 (11th Cir 2002)

⁴¹ *Coserv Limited Liability Corp v Southwestern Bell Telephone Co*, 350 F 3d 482, 488 (5th Cir 2003) (emphasis added)

⁴² Although Issue 8(b) also addresses rate-setting for Section 271 that sub-issue presumes that the answer to the threshold question – does a state commission have authority to require BellSouth to include Section 271 network elements in a Section 252 interconnection agreement – is affirmative. As BellSouth explains herein the answer is negative in all respects, including rate-setting.

toward market negotiation. The bottom line on all of the 271-related arguments is the common-sense reality that if the CLECs were to prevail on this argument, then the CLECs will have effectively used the TRA to override the FCC's decisions about market-based, real competition. That simply cannot be the right answer.

Despite the express limitations contained in Section 252, the CLECs in this case suggest the Section 252 negotiation, arbitration, and approval process applies equally to Section 251 elements and Section 271 elements. This suggestion is misplaced. CompSouth ignores that *there is no language in Section 252 that refers to Section 271*. Congress allowed states to “set” rates only “for the purposes of subsection (c)(3) of such Section [251]” and to arbitrate agreements to “ensure that such resolution and conditions meet the requirements of Section 251”

State commissions do not have the authority to set rates for Section 271 elements. This is clear because the language in Section 252 limits state commission rate-setting authority to Section 251 elements. Section 252(d)(1) provides that state commissions may set rates for network elements *only* “for purposes of subsection (c)(3) of such Section [251].” The FCC has stated that this Section “is quite specific in that it only applies for the purposes of implementation of Section 251(c)(3)” and “does not, by its terms” grant the states any authority as to “network elements that are required under Section 271.”⁴³ This express limitation in Section 252(d)(1) on state commission pricing authority in arbitrations cannot be blindly brushed aside by the CLECs.

Even if there could be any legitimate question about how to read these statutes, the FCC has already answered the question. In addition to the express language of Section 252, the FCC has confirmed that Section 251's pricing standards (over which the state commissions have

⁴³ *TRO* at ¶ 657

authority) do not apply to checklist elements under Section 271.⁴⁴ It “clarif[ied] that the FCC will determine whether or not the applicable pricing standards are met,” either in the context of a Section 271 application for long distance authority or, thereafter, in an enforcement proceeding.⁴⁵ (“Whether a particular checklist element’s rate satisfies the just and reasonable pricing standard of Sections 201 and 202” is a fact-specific inquiry that the [FCC] will undertake in the context of a BOC’s application for Section 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6)).⁴⁶

Finally, the FCC held that “[w]here there is no impairment under Section 251 and a network element is no longer subject to unbundling, we look to *Section 271* and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements.”⁴⁷ The FCC went on to hold that “[s]ection 252(d)(1) provides the pricing standard ‘for network elements for purposes of [Section 251(c)(3)], and does not, by its terms, apply to network elements that are required only under Section 271.’”⁴⁸

The FCC has further held that the rates for Section 271 elements are subject to the standard set forth in Sections 201 and 202 – statutes applied and enforced by the FCC.⁴⁹

⁴⁴ *TRO*, at ¶¶ 662, 664

⁴⁵ *Id*

⁴⁶ The FCC further explains that BellSouth might meet its burden of proof in such a proceeding by demonstrating that the rate for a Section 271 element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a Section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.

TRO at ¶ 664. As Ms. Blake made clear, BellSouth has entered into over 150 commercial agreements (Blake Rebuttal at 3). Ms. Blake also explained that BellSouth satisfies its 271 obligations to provide de-listed loops and transport through its special access and private line tariffs. *Tr.* at 99.

⁴⁷ *TRO* at ¶ 656 (emphasis added).

⁴⁸ *Id.* at ¶ 657 (brackets in original).

⁴⁹ See *TRO* at ¶¶ 656, 664 (“Whether a particular checklist element’s rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake”), also *TRO* at ¶

Courts, moreover, uniformly have held that claims based on Sections 201(b) and 202(a) are within the FCC's jurisdiction. Section 201(b) speaks in terms of "just and reasonable" which are determinations that "Congress has placed squarely in the hands of the [FCC]."⁵⁰ As the D.C. Circuit noted in *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, (D.C. Cir. 1996), Sections 201(b) and 202(a) "authorized the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory." The idea of FCC regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel. The Supreme Court has determined that Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act" and required that state commission regulation be guided by FCC regulations.⁵¹

The CLECs will likely contend that while the FCC spoke of itself as the "regulator" in charge of compliance with the Section 271 just and reasonable standard, that "It did not, however, establish itself as the agency in charge of arbitrating the rate levels when they are in dispute."⁵² The distinction the CLECs may attempt to draw is one without a difference. It is merely an excuse for continuing to rely on commissions to set rates rather than participating in market-based negotiation and business.

The entity charged with "regulating" the rates (which in this case the CLECs admit is the FCC) is by definition the entity that must resolve the issue when the rates "are in dispute."

665 ("In the event a BOC has already received Section 271 authorization, Section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271 ")

⁵⁰ *In Re Long Distance Telecommunications Litigation*, 831 F.2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp v National Association of Recycling Industries, Inc*, 449 U.S. 609, 612 (1981)), *see also Total Telecommunications Services Inc v American Telephone & Telegraph Co*, 919 F Supp 472, 478 (D D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd*, 99 F 3d 448 (D C Cir 1997)

⁵¹ *AT&T Corp v Iowa Utilities Board*, 525 U.S. 366, 378 n 6 (1999), *Indiana Bell Telephone Company, Inc v Indiana Utility Regulatory Commission*, 359 F 3d 493 (7th Cir 2004)

⁵² *See, e g, CLECs' SJ Response* at 31

Starting from a presumption of old-style, pre-competition rate-setting, the CLECs assume that a regulatory body must set the rates in the first instance, but that is not the case in today's competitive market. Instead, rather, the provider sets the rates in accordance with the just and reasonable standard, and the *FCC* resolves any disputes that arise surrounding those rates.⁵³ In a competitive market, regulators should not step in until there is a need, but the CLECs want the regulators to step in and over-ride the market that has produced both intermodal competition and more than 150 negotiated commercial agreements between CLECs and BellSouth.

The FCC is right to treat 271 elements differently. It makes sense that the FCC rules regarding Section 271 elements (*i.e.*, that the provider can set the rate initially as opposed to the regulator) are – and should be – less stringent than those under Section 251. Section 251(b) and (c) set forth the provisions that Congress deemed essential to the development of local competition and without which a CLEC is legally “impaired” within the meaning of Section 251(c)(1). Congress thus ensured that state commissions have authority to arbitrate the rates, terms and conditions of access to these elements. *Conversely, the FCC has determined that CLECs are not impaired without access to Section 271 elements that no longer meet the Section 251 test.* The FCC’s conclusions cannot – and should not – be brushed aside. The FCC has reached these conclusions. It has done so based on an evidentiary finding that competitive alternatives for such elements are readily available in the marketplace.⁵⁴ Congress did not

⁵³ CompSouth has implied that BellSouth’s ability to change its special access prices requires state commission action under Section 271. CompSouth is wrong. While the FCC did not accept ILECs’ arguments concerning the availability of special access as an alternative to UNEs in situations in which CLECs are impaired (*see, e.g., TRRO* at ¶ 59), when Section 251 UNEs are no longer available “a competitor is not impaired in its ability to offer services without access to that element” and it would be “counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate.” *UNE Remand Order* at ¶ 473. Indeed, in the *TRRO* the FCC clearly contemplated that CLECs could transition to special access services and commercial agreements. *TRRO* at ¶¶ 142, 195, 228.

⁵⁴ *See e.g., UNE Remand Order* at ¶ 471 (where a checklist item is no longer required under Section 251, a competitor is “not impaired in its ability to offer services without access to that element,” which can be “acquire[d] in the marketplace at a price set by the marketplace.”)

subject access to these 271 elements to the same regulatory scrutiny. Rather, consistent with Congress's overriding intent to "reduce regulation," parties should be allowed to contract freely as to those items without state regulatory interference.⁵⁵

To make their case, the CLECs ignore all of the express limitations on state commission authority in Section 252 and the relevant case law; instead, they rely on Section 271(c)(1)'s reference to "agreements that have been approved under Section 252."⁵⁶ By its terms, however, that Section expressly refers *only* to "approv[al]" of agreements under Section 252. *It says nothing about state commission arbitration or rate-setting authority.* The limitations on rate-setting and arbitration are directly relevant here because the CLECs want the Authority to arbitrate issues around, and set rates for, the Section 271 elements. The issue before the Authority, therefore, goes far beyond the scope of the Authority's authority to approve agreements, yet that is the extent of the statutory provision in Section 271 upon which the CLECs rely.

Just as the TRA is bound to heed the General Assembly's limits on its jurisdiction, the FCC (and the state commissions when the FCC or Congress delegates duties to them) must heed carefully the words of Congress. The CLECs' argument utterly disregards the words that expressly limit state rate-setting authority. Crucially, Congress made no mention of including Section 271 elements in negotiations under Sections 251(c)(1) and 252(a)(1), arbitration under Section 252(b), or state commission resolution of open issues under Section 252(c). Most importantly for present purposes, Congress did not give state commissions *any* rate-setting

⁵⁵ *Id* Under these circumstances, the FCC concluded that "it would be counterproductive to mandate that the incumbent offer[] the element" at forward looking prices " Instead, "the market price should prevail, as opposed to a regulated rate"

⁵⁶ Gillan Direct at 44.

authority for Section 271 requirements in Section 252(d)(1). On the contrary, *all* of those Sections are explicitly linked – and limited – to implementation of Sections 251(b) and (c).

Mr. Gillan also cites to Section 271(c)(1) for the proposition that “checklist items [must] be offered through interconnection agreements approved under Section 252 of the Act.”⁵⁷ Section 271(c)(1) says nothing of the sort. Section 271(c)(1) provides that to comply with Section 271, a BOC must meet the requirements of either subparagraph (A) or (B). Subparagraph (A), in turn, provides that a BOC meets the requirements of the Section if it “has entered into one or more binding agreements that have been approved under Section 252” The reference to Section 252 agreements refers to agreements that incorporate the required Section 251 elements – nothing is said about Section 271 elements. Section 271(c)(1) only requires approved Section 252 agreements or an SGAT to obtain Section 271 authority; it does not require Section 271 elements incorporated into Section 252 agreements (nor would it, because such a requirement would conflict with the express limitations in Section 252 addressed above).

5. Issue 8(a): The FCC Has Exclusive Authority Over the Enforcement of Section 271 Elements.

States have no authority to regulate access to network elements provided pursuant to Section 271, including any attempt to require the inclusion of Section 271 elements in a Section 252 interconnection agreement. Section 271 vests authority in the *FCC* to regulate network elements provided pursuant to that section. Thus, to obtain long distance relief, a BOC may apply to the *FCC* for authorization to provide such services, and the *FCC* has exclusive authority for “approving or denying” the requested relief.⁵⁸ Once a BOC obtains Section 271 authority (as

⁵⁷ Gillan Direct at 44, Gillan Deposition, Hearing Exhibit 4 at 60

⁵⁸ 47 U.S.C. § 271(d)(1),(3)

BellSouth has throughout its region), continuing enforcement of Section 271 obligations rests solely with the FCC under Section 271(d)(6)(A) of the Act.

The FCC made clear in the *TRO* that the prices, terms, and conditions of Section 271 checklist item access, and a BOC's compliance with them, are within the FCC's exclusive purview in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6).⁵⁹ Section 271 vests authority exclusively in the FCC to "regulate" network elements provided pursuant to that section and for which no impairment finding has been made.⁶⁰ The role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271-approval process.⁶¹ State commissions' authority to approve interconnection agreements entered into "pursuant to section 251," to impose arbitrated results under Section 251(c)(1) in order to ensure that any agreements "meet the requirements of section 251," and to set rates under Section 252 "for purposes of" the interconnection and access to network elements required by 251(c)(2) and (c)(3) are specifically limited by the terms of the statute to implementing Section 251 obligations, not Section 271 obligations. Moreover, the FCC refused to graft Section 251 pricing and combination

⁵⁹ See *TRO* at ¶ 664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake"), also *TRO* at ¶ 665 ("In the event a BOC has already received section 271 authorization, section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271") Nothing in *USTA II* or in the *TRRO* disturbed this FCC ruling

⁶⁰ 47 U.S.C. § 271 For example, Section 271(d)(1) provides that to obtain interLATA relief, a BOC "may apply to the [FCC] for authorization to provide interLATA services" Congress gave the FCC the exclusive authority for "approving or denying the authorization requested in the application for each State." 47 U.S.C. § 271(d)(3) "It is," the Commission has determined, "the [FCC's] role to determine whether the factual record supports a conclusion that particular requirements of 271 have been met" *Application of BellSouth Corporation, et al Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, *Memorandum Opinion and Order*, 13 FCC Rcd 539, 555, ¶ 29 (1997) And once a BOC obtains Section 271 authority (as BellSouth has in each of the 9 states in which it provides telephone service), continuing enforcement of Section 271 obligations, by the express terms of the statute, rest solely with the FCC 47 U.S.C. § 271(d)(6)

⁶¹ 47 U.S.C. § 271(d)(2)(B)

requirements onto Section 271 in its *TRO*,⁶² a decision upheld by the *USTA II* court, which characterized the cross-application of Section 251 to Section 271 as “erroneous.”⁶³ In sum, Section 252 grants state commissions authority only over the implementation of Section 251 obligations, not Section 271 obligations.⁶⁴

Congress could have specified that states have authority to establish the rates, terms, and conditions for purposes of the competitive checklist under Section 271, but it did not do so. That choice must be respected. As the FCC has explained, Congress intended that a single federal agency, not 51 separate bodies, exercise “exclusive authority” over “the Section 271 process.”⁶⁵ In the D.C. Circuit’s words, Congress “has clearly charged the FCC, and not the State commissions,” with assessing BOC compliance with Section 271.⁶⁶ The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section.

If there is an issue of whether BellSouth is meeting its Section 271 obligations through approved agreements or otherwise, Congress was explicit as to what body should address whether BellSouth is in compliance. Section 271(d) authorizes the FCC, not the Authority, both to approve 271 applications and to determine post-approval compliance. If the CLECs are concerned about BellSouth’s Section 271 compliance, the place to raise that concern is the FCC,

⁶² *TRO* at ¶¶ 656 – 664

⁶³ *USTA II*, 359 F.3d at 590

⁶⁴ See also *MCI Telecomm. Corp.*, 298 F.3d at 1274 (requirement that ILEC negotiate items outside of Section 252 is “contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate”), and 47 U.S.C. §§ 251(b), (c) (setting forth the obligation of all local exchange carriers and incumbent local exchange carriers, respectively)

⁶⁵ *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona*, NSD-L-97-6, *Memorandum Opinion and Order*, 14 FCC Rcd 14392, 14401, ¶ 18 (1999) (“*InterLATA Boundary Order*”)

⁶⁶ *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998)

not the Authority. In the FCC's words, that federal agency has "*exclusive authority*" over the entire "Section 271 process."⁶⁷

The CLECs have previously attempted to distinguish what they concede to be the FCC's exclusive enforcement authority over Section 271 from what they call the state commission's "Section 252 authority."⁶⁸ The obvious flaw in the CLECs' argument is that, as demonstrated above, Section 252 does not confer any jurisdiction over Section 271 elements to the state commissions – in fact, it expressly limits state commission authority to set rates and arbitrate to *Section 251* obligations.

Furthermore, the arrangement advocated by the CLECs would be unworkable as a practical matter. Under the CLECs' argument, Section 252 interconnection agreements would contain both Section 251 and 271 elements. The CLECs concede, however, that the state commission has no enforcement authority over Section 271 elements.⁶⁹ Thus, under the CLECs' theory, state commissions would enforce certain parts of an interconnection agreement (*i.e.*, the 251 elements) and the FCC would enforce other parts (*i.e.*, the 271 elements) of the same contract. That scenario, of course, makes no sense.⁷⁰

⁶⁷ Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, 14401-02, ¶ 18 (1999) (emphasis added), see also this Commission's Order dated May 25, 2005, *In re Competitive Carriers of the South, Inc.*, in Docket No. 29393, at p. 18 ("ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of § 271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission")

⁶⁸ See, e.g., *CLECs' SJ Response* at 29

⁶⁹ See *CLECs' SJ Response* at 26 ("The Joint CLECs do not contend that if the Section 271 checklist items are not in the ICA that the Authority has the enforcement authority to revoke BellSouth's long distance entry or otherwise sanction BellSouth")

⁷⁰ It is also inconsistent with the FCC's statements in the *UNE Remand Order* that "*the prices, terms, and conditions* set forth in sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of section 271." *UNE Remand Order* at ¶ 469 (emphasis supplied)

6. Issue 8(a): Federal Decisions and State Commission Decisions Confirm the FCC's Exclusive Authority Over Section 271 Elements.

Despite federal decisions and state commission decisions, CompSouth contends that the Authority has the authority to make BellSouth include its Section 271 obligations in Section 252 interconnection agreements. As outlined above, however, CompSouth ignores completely that interconnection agreements result from a Section 251 request and are evaluated to ensure compliance with Section 251. Indeed, decisions from Washington to Mississippi demonstrate that state commissions have no Section 271 regulatory authority.

a. Federal Court Decisions

Three recent federal decisions address this issue. First, on appeal from a decision from the Mississippi Public Service Commission, the United States District Court explained:

Even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC, which may (i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company ... or (iii) suspend or revoke such company's approval to provide long distance service if it finds that the company has ceased to meet any of the conditions required for approval to provide long distance service. Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service.

⁷¹

Second, the United States District Court in Kentucky confirmed:

While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.

⁷²

⁷¹ *BellSouth Telecommunications, Inc v Mississippi Public Serv Com'n et al*, Civil Action No 3 05CV173LN, *Memorandum Opinion and Order* (S D Miss Apr. 13, 2005) ("Mississippi Order"), 2005 U S Dist LEXIS 8498, p 17 of slip opinion

⁷² *BellSouth Telecommunications, Inc v Cnergy Communications Co , et al*, Civil Action No 3 05-CV-16-JMH, *Memorandum Opinion and Order*, (E D Ky Apr 22, 2005) ("Kentucky Order"), p 12 of slip opinion, The foregoing decisions are consistent with *Indiana Bell v Indiana Utility Regulatory Com'n et al*, 359 F 3d 493, 497 (7th Cir 2004) ("Indiana Bell"), in which the Seventh Circuit described a state commission's role under Section 271 as "limited" to "issuing a recommendation." Consequently, when the Indiana Commission attempted to "parlay

Third, on June 9, 2005, a federal district court in Montana held that Section 252 did not authorize a state commission even to approve a negotiated agreement for line sharing between Qwest and Covad. It reasoned that Section 252 did not apply to this “commercial agreement” because line sharing “is not an element or service that must be provided under Section 251.”⁷³ This decision squarely conflicts with Mr. Gillan’s contention that, under Section 271(c)(2)(A), Section 271 elements *must* be contained in a Section 252 interconnection agreement.⁷⁴ That is because if a state commission cannot even approve a negotiated agreement that does not involve Section 251 items, it certainly cannot *arbitrate* terms that are not mandated by Section 251, where, as discussed above, Congress expressly limited the state commissions’ authority to implementing Section 251.

b. State Commission Decisions

In addition to the foregoing federal decisions, a plethora of state commissions have given proper effect to the federal statutory scheme. Most directly on point are a series of arbitration decisions involving one of CompSouth’s members, Covad, in which the question of whether a state commission can include Section 271 obligations in Section 252 interconnection agreements has been answered “no” time and again. In addition, in cases involving Covad and other CompSouth members, state commissions from Kansas, Massachusetts, Pennsylvania, Texas, and Rhode Island have also addressed this issue directly. Other state commissions have also confirmed the FCC, rather than state commissions, is charged with Section 271 oversight,

its limited role in issuing a recommendation under section 271” into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service, the Seventh Circuit preempted that attempt

⁷³ *Qwest Corp v Schneider, et al*, 2005 U S Dist LEXIS 17110, CV-04-053-H-CSO, at 14 (D Mont June 9, 2005)

⁷⁴ Gillan Direct at 43

although these cases do not specifically address the inclusion of Section 271 obligations in Section 252 interconnection agreements. The relevant decisions are detailed below.⁷⁵

Washington Utilities and Transportation Commission

The Washington Utilities and Transportation Commission (“Washington Commission”) explained that “state commissions do not have authority under either Section 271 or Section 252 to enforce the requirements of Section 271.”⁷⁶ With respect to Section 252 in particular, the Washington Commission found that even if the parties agreed to negotiate the issue of including Section 271 elements in a Section 252 arbitration proceeding (which BellSouth has not done), the parties could *not* confer state commission authority over this exclusively federal aspect of the Act. Thus, the Washington Commission held that

requiring Qwest to include Section 271 elements in the context of arbitration under Section 252 would conflict with the federal regulatory scheme in the Act, as Section 271 of the Act provides authority only to the FCC and not to state commissions.

Utah Public Service Commission

In an analogous arbitration proceeding, the Utah Public Service Commission (“Utah Commission”) held that “Section 252 was clearly intended to provide mechanisms for parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251

⁷⁵ Of the state commission orders referenced in this section, the CLECs have appealed the Texas order referenced herein, and various parties have appealed order preceding the Pennsylvania decision cited below

⁷⁶ *In re Petition for Arbitration of Covad with Qwest*, Docket No UT-043045, Order No 06 (Feb 9, 2005), 2005 Wash UTC LEXIS 54 Hereinafter “Washington Covad/Qwest Decision ”

obligations via incorporation by reference to access obligations under Section 271 or state law.”⁷⁷ The Utah Commission reasoned that

Section 271 on its face makes quite clear that the FCC retains authority over the access obligations contained therein. Furthermore, Section 271 elements are distinguishable from Section 251 elements precisely because the access obligations regarding these elements arise from separate statutory bases. The fact that under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration does not lead us to conclude that it would be reasonable in this case for us to do so.⁷⁸

Iowa Utilities Board

The Iowa Utilities Board issued a similar ruling on May 24, 2005. That commission acknowledged a state commission has only “a consulting role” in addressing Section 271. The Iowa commission concluded it lacked “jurisdiction or authority to require that Qwest include [Section 271] elements in an interconnection agreement arbitration brought pursuant to § 252.”⁷⁹

Idaho Public Utilities Commission

On July 18, 2005, the Idaho Public Utilities Commission entered its arbitration order between Covad and Qwest in Case No. CVD-T-05-1.⁸⁰ The Idaho Commission concluded “that the Commission does not have the authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement.”⁸¹

⁷⁷ *In re Petition for Arbitration of Covad with Qwest*, Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005), 2005 Utah PUC LEXIS 16 (“Utah Covad/Qwest Decision”).

⁷⁸ *Id.*

⁷⁹ *In re Petition for Arbitration of Covad with Qwest*, Iowa Utilities Board, Docket No. ARB-05-1 (May 24, 2005), 2005 Iowa PUC LEXIS 186 (“Iowa Covad/Qwest Decision”).

⁸⁰ Order No. 29825; 2005 Ida PUC LEXIS 139.

⁸¹ Hereinafter “Idaho Covad/Qwest Decision.”

South Dakota Public Service Commission

The South Dakota Public Service Commission acted in a consistent manner, finding it

does not have the authority to enforce Section 271 requirements within this section 252 arbitration. Section 252(a) provides that interconnection negotiations are limited to requests for interconnection, services, or network elements pursuant to section 251 In addition ... section 252(c)(1) requires the Commission to ensure that [its] resolution of open issues meet the requirements of section 251 of this title, including the regulations prescribed by the FCC pursuant to section 251 of this title The language in these sections clearly anticipates that section 252 arbitrations will concern section 251 requirements, not section 271 requirements.⁸²

Oregon Public Utility Commission, Minnesota Public Utilities Commission

On September 6, 2005, the Oregon Public Utility Commission adopted an arbitrator's decision, which found, in relevant part, that:

Every state within the Qwest operating region that has examined [the Section 271] issue has done so in a thoughtful, thorough and well-reasoned manner. In each case, the agency with the authority to review the Covad/Qwest ICA dispute has found that there is no legal authority requiring the inclusion of Section 271 UNEs in an interconnection agreement subject to arbitration under Section 251 of the Act, and [the Oregon Commission] adopt[s] the legal conclusions that they all hold in common⁸³

The Oregon Commission expressly adopted the following legal conclusions reached by an arbitrator and confirmed by the Minnesota state commission:

There is no legal authority in the Act, the *TRO*, or in state law that would require the inclusion of section 271 terms in the interconnection agreement over Qwest's objection ... both the Act and the *TRO* make it clear that state commissions are charged with the arbitration of section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to section 271.⁸⁴

⁸² *In re Petition for Arbitration of Covad with Qwest*, South Dakota Public Service Commission Docket No TC05-056 (July 26, 2005), 2005 S D PUC LEXIS 137 ("South Dakota Covad/Qwest Decision")

⁸³ *In re Petition for Arbitration of Covad with Qwest*, Oregon Public Utility Commission, Order No 05-980, ARB 584 (Sept 6, 2005), 2005 Ore PUC LEXIS 445 ("Oregon Covad/Qwest Decision")

⁸⁴ The Minnesota Public Service Commission issued its Order Resolving Arbitration Issues in Docket No P-5692, 421/IC-04-549 on March 14, 2005 in which it adopted, in part, the December 16, 2004 Arbitrator's Report in that docket

Pennsylvania Public Utility Commission

In addition to the arbitration decisions between Covad and Qwest, other state commissions have issued similar rulings on Section 271. On June 10, 2005, the Pennsylvania Commission ruled Verizon was not obligated to file state tariffs including its Section 271 obligations because:

[T]he enforcement responsibilities of Section 271 compliance lies with the FCC. Therefore, the Commission will not oblige Verizon PA to produce tariff amendments that reflect its Section 271 obligations. However, the Commission will continue to monitor Verizon PA's compliance with its Section 271 obligations and, if necessary, initiate appropriate complaint proceedings before the FCC.⁸⁵

Massachusetts Department of Telecommunications and Industry

On July 14, 2005, the Massachusetts Department of Telecommunications and Industry entered its Arbitration Order in Docket No. D.T.E. 04-33.⁸⁶ The Massachusetts Commission held that

our authority to review and approve interconnection agreements under § 252 does not include the authority to mandate that Verizon include § 271 network elements in any of its § 252 interconnection agreements.⁸⁷

Kansas Corporation Commission

The Kansas Corporation Commission entered its Order No. 15: Commission Order on Phase II UNE Issues addressing a prior recommendation of an arbitrator in Docket Nos. 05-

⁸⁵ See 2005 Ore PUC LEXIS 445 at *32 ("Pennsylvania Tariff Decision")

⁸⁶ *Pennsylvania Public Utility Commission v Verizon Pennsylvania Inc, et al*, R-00049524, R-00049525, R-00050319, R-00050319C0001, Docket No P-00042092, 2005 Pa. PUC LEXIS 9 (June 10, 2005) In the Pennsylvania decision, the Commission referred to various appeals of prior orders pending the United States District Court, Middle District of Pennsylvania

⁸⁷ *In re Petition of Verizon New England, Inc d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, D T E 04-33, Arbitration Order (July 14, 2005) ("Massachusetts Arbitration Order")

BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 on July 18, 2005.⁸⁸ In relevant part, the Kansas Commission held that “the FCC has preemptive jurisdiction over 271 matters.”⁸⁹

Public Utility Commission of Texas

On June 17, 2005, the Texas Commission issued an order in which it declined to include terms and conditions for provisioning of UNEs under Section 271 in an interconnection agreement. The Texas Commission explained that it

declines to include terms and conditions for provisioning of UNEs under FTA § 271 in this ICA. The Commission finds that the FTA provides no specific authorization for the Commission to arbitrate Section 271 issues; § 271 only gives states a consulting role in the 271 application approval process.⁹⁰

Rhode Island Public Utilities Commission

The Rhode Island Commission addressed Section 271 in connection with proposed tariff changes made by Verizon. In a July 28, 2005 order in Docket No. 3662, *In re: Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18*,⁹¹ that commission rejected CLEC attempts to include obligations arising under “applicable law” such as Section 271 in Verizon’s wholesale tariff. The commission explained “Section 271 is a federal statute and it is inherently logical to have the FCC interpret the statute.” The Rhode Island Commission concluded that “[a]t this time, it is apparent to the Commission that at the bistro serving up the BOCs’ wholesale obligations, the kitchen door numbered 271 is for ‘federal employees only.’”

Alabama, North Carolina, New York

In addition to the foregoing decisions, other state commissions have addressed Section 271 obligations more generally. For example, the Alabama Commission has also concluded that

⁸⁸ Hereinafter “Kansas Order ”

⁸⁹ See ** 7 – 8

⁹⁰ Arbitration Order, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Texas P U C Docket No 28821 (June 17, 2004) (“Texas Order”) The Texas Order has been appealed to the United States District Court, Western District of Texas

⁹¹ Hereinafter “Rhode Island Order ”

the responsibility for overseeing BellSouth's obligations under Section 271 remains with the FCC, not the Commission. In an order in Docket No. 29393, which involved a petition filed by CompSouth – a party to these proceedings – seeking emergency relief in connection with the “No New Adds” controversy, the Alabama Commission said:

With regard to MCI's argument that BellSouth has an independent obligation to provision UNE-P switching pursuant to § 271 of the Telecommunications Act of 1996, we conclude, as did the court in [the *Mississippi Order*, infra n. 14], that given the FCC's decision “to not require BOCs to combine § 271 elements no longer required to be unbundled under § 251, it (is) clear that there is no federal right to § 271 based UNE-P arrangements. This conclusion is further bolstered by the fact that the ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of § 271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission. MCI's argument that there is an independent obligation under § 271 to provide UNE-P is accordingly rejected.⁹²

Similarly, in Docket P-55, Sub 1550, the North Carolina Utilities Commission, when also considering various emergency petitions concerning the recent “No New Adds” controversy, addressed a similar claim by MCI, saying:

MCI argued that Section 271 independently supported its right to obtain UNE-P from BellSouth. BellSouth denied this, saying that while it is obligated to provide unbundled local switching under Section 271, such switching is not required to be combined with a loop, is subject to the exclusive jurisdiction of the FCC, and is not provided via interconnection agreements. The Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.⁹³

⁹² *Order Dissolving Temporary Standstill And Granting In Part And Denying In Part Petitions For Emergency Relief*, Alabama Public Service Commission Docket No. 29393 (May 25, 2005) (“May 25, 2005 Order”), at p. 18 (footnotes omitted) (“Alabama No New Adds Order”).

⁹³ *Order Concerning New Adds, In re Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the TRRO*, North Carolina Public Service Commission Docket No. P-55, Sub 1550 (Apr. 25, 2005) (“North Carolina No New Adds Order”).

Likewise, the New York Commission recognized that “[g]iven the FCC’s decision to not require BOCs to combine 271 elements no longer required to be unbundled under section 251, it seems clear that there is no federal right to 271-based UNE-P arrangements.”⁹⁴

All of these decisions, which hold that it is the FCC that has jurisdiction over matters related to Section 271 elements, are obviously correct as a matter of law. States have no authority to regulate access to network elements provided pursuant to Section 271, including any attempt to require the inclusion of Section 271 elements in a Section 252 interconnection agreement. Section 271 vests authority in the FCC to regulate network elements provided pursuant to that section. Congress could have specified that states have authority to establish the rates, terms, and conditions for purposes of the competitive checklist under Section 271, but it did not do so. That choice must be respected. As the FCC has explained, Congress intended that a single federal agency, not 51 separate bodies, exercise “exclusive authority” over “the Section 271 process.”⁹⁵ In the D.C. Circuit’s words, Congress “has clearly charged the FCC, and not the State commissions,” with assessing BOC compliance with Section 271.⁹⁶ The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section. Moreover, in light of *USTA II*, it is obvious that when Congress assigns a certain responsibility to the FCC, the FCC, and not state commissions, must make the relevant determinations.

⁹⁴ See also *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC’s TRO on Remand*, New York Public Service Commission Case No. 05-C-0203 (March 16, 2005) (“New York Order”).

⁹⁵ Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, NSD-L-97-6, *Memorandum Opinion and Order*, 14 FCC Rcd 14392, 14401, ¶ 18 (1999) (“*InterLATA Boundary Order*”).

⁹⁶ *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

Decisions Previously Relied Upon by CompSouth Are Clearly Distinguishable

CLECs have previously cited to dicta contained in a one federal case – *Qwest Corporation v. Minnesota Public Service Commission*, 2004 WL 1920970 (D. Minn. 2004) – as support for the claim that Section 271 elements belong in Section 252 agreements. That decision, however, is clearly distinguishable because the FCC, ruling on the same fact pattern, reached a different conclusion about Section 252 in the *Qwest ICA Order*. In the *Qwest ICA Order*, the FCC found that “**only** those agreements that contain an ongoing obligation relating to Section 251(b) or (c) must be filed under [Section] 252(a)(1).”⁹⁷ The FCC reiterated this interpretation throughout the Order, noting that while “a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under Section 252(a)(1),” “settlement contracts that **do not affect an incumbent LEC’s ongoing obligations relating to Section 251 need not be filed.**”⁹⁸ This finding is consistent with the FCC’s Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations.⁹⁹ More importantly, the *Qwest Corp. v. Minnesota Public Service Commission* case predates the 2005 federal court decisions in Mississippi, Kentucky, and Montana.

CompSouth also attempted previously to distinguish the recent federal decisions in Kentucky and Mississippi on this issue – any such attempt should be rejected by the Authority. Both the Kentucky and Mississippi courts specifically held that decisions regarding 271

⁹⁷ *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26 (2002) (“Qwest ICA Order”) (emphasis added)

⁹⁸ Qwest ICA Order, ¶ 12 (emphasis added), *see also Id.*, ¶ 9 (only those “agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in Sections 251(b) and (c)” must be filed under Section 252)

⁹⁹ *See Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, FCC 04-57 (2004)

obligations rested with *the FCC*.¹⁰⁰ An attempt by a state commission to set rates or terms and conditions for Section 271 elements would directly conflict with federal court precedent.

In terms of state commission authority, CompSouth's witness cited to a July 11, 2005 arbitration order from the Missouri Public Service Commission.¹⁰¹ The Missouri decision has been appealed to United States District Court, Eastern District of Missouri; indeed, the CLECs *agreed* to the entry of a preliminary injunction which *prevented* CLECs from adding new switching arrangements under purported Section 271 authority.¹⁰²

To the extent that CompSouth relies in its post-hearing brief to decisions from Maine, Oklahoma, Illinois, and Vermont, such reliance is misplaced. Verizon has appealed the Maine decision; SBC Illinois has appealed the Illinois decision, the Oklahoma commission has apparently delayed taking action on an arbitrator's decision that CompSouth has cited to previously, and the Vermont commission has not acted on a recommended order pending before that commission.¹⁰³

¹⁰⁰ *Mississippi Order*, p 17 of slip opinion, *Kentucky Order*, p 12 of slip opinion

¹⁰¹ See Gillan Direct at 47

¹⁰² See Sept 9, 2005, Preliminary Injunction Order, *Southwestern Bell Telephone, L P d/b/a SBC Missouri v Missouri Public Service Commission*, Case No 4:05-CV-01264-CAS, ¶ 1 (the "PSC's July 11, 2005 Arbitration Order as well as related orders approving interconnection agreements are hereby enjoined to the extent they require SBC Missouri to fill new orders for unbundled local switching or UNE-P pursuant to the Federal Telecommunications Act of 1996").

¹⁰³ See, e.g., *Verizon New England Inc v Public Utilities Commission of Maine et al*, Case No 1:05-CV-53 (U.S. Dist. Ct. D. Me). There are two appeals pending against orders of the Illinois Commission, *Illinois Bell Telephone Co v Edward C. Hurley et al*, Case No 05-C-1149 (U.S. Dist. Ct. E.D. Ill.), and an appeal to the appellate court of the Fourth Judicial District. BellSouth believes the latter appeal may be the direct appeal of the case cited in the CLECs' *SJ Response*, p 16. In CompSouth's Georgia brief, it implied the Vermont Commission had issued a favorable 271 decision without providing any support for that statement. BellSouth believes this is incorrect.

- B. Issue 8(b): Section 271 and State Law:** *If the answer to part (a) is affirmative in any respect, does the Authority have the authority to establish rates for such elements?*

Relevant Contract Provisions: PAT-1 Section 1.1; PAT-2 Section 1.1

As explained above, state commissions have no authority in any respect to force BellSouth to include Section 271 network elements or network elements unbundled under state law in Section 252 interconnection agreements. Consequently, if the Authority gives proper effect to the existing limitations on its authority under federal law, this sub-issue is easily addressed – the Authority need not discuss it at all. Moreover, for all the reasons discussed above, even if the TRA *could* legally set rates, it *should* not. Engaging in commission-driven rate setting would be flatly inconsistent with the FCC’s decisions in the *TRO* and *TRRO*.

It is important to recognize that Section 271 rate-setting has particular legal ramifications. That is, even if a state commission were to construe Section 271 as requiring an agreement to be approved by a state commission under Section 252, the scope of that a state commission approval is expressly limited to ensuring agreements comply with **Section 251** and, state commissions clearly have no authority to establish rates for such elements, which underscores that state commissions have no authority to require inclusion of the Section 271 elements to begin with.

Section 271 “establish[es] a comprehensive framework governing Bell operating company (BOC) provision of ‘interLATA service’” and, as shown above, provides only an extremely limited role for state commission participation within that framework.¹⁰⁴ In addition, section 271 arose out of the Modification of Final Judgment (MFJ),¹⁰⁵ and “the states had no

¹⁰⁴ *E.g.*, Memorandum Opinion and Order, *Petition of SBC Communications for Forbearance*, 19 FCC Rcd 5211, ¶ 7 (2004)

¹⁰⁵ *see TRO* at ¶ 655 at n 1986,

jurisdiction” over the implementation of the MFJ.¹⁰⁶ And the FCC has already ruled that it is *federal* law – namely, sections 201 and 202 – that established the standard that BOCs must meet in offering access to 271 elements.¹⁰⁷

State commissions, therefore, cannot assert state law authority to regulate Section 271 elements, which “are a purely federal construct.”¹⁰⁸ In particular, state commissions cannot rely on state law to expand the list of Section 271 elements or to regulate the rates, terms, and conditions under which BOCs must provide access to those elements.

The FCC has held that, in Section 271, Congress identified a limited set of specific network elements to which BOCs must provide access irrespective of whether their competitors would be impaired without access to those elements as UNEs.¹⁰⁹ Congress also expressly prohibited the FCC from “extend[ing] the terms used in the competitive checklist” to include additional network elements.¹¹⁰ It necessarily follows that any decision by a state commission purporting to create new Section 271 obligations under state law or to regulate them in any way, including setting rates, conflicts with Congress’s determination and, therefore, is preempted.¹¹¹

More generally, any efforts by state commissions to regulate the prices of Section 271 elements are preempted because they are inconsistent with the FCC’s determination (affirmed by the D.C. Circuit) that Sections 201 and 202 establish the standard for assessing the rates, terms, and conditions under which BOCs must provide access to 271 elements.¹¹² As the FCC has

¹⁰⁶ *InterLATA Boundary Order*, 14 FCC Rcd 14392, 14401, ¶ 16

¹⁰⁷ *See TRO* at ¶ 656, *UNE Remand Order* at ¶ 470, *USTA II*, 359 F 3d at 588-90

¹⁰⁸ *InterLATA Boundary Order*, 14 FCC Rcd 14392, 14401, ¶ 18

¹⁰⁹ *See TRO* at ¶ 653

¹¹⁰ 47 U.S.C. § 271(d)(4), *see also* 47 U.S.C. § 160(a), (d) (permitting the FCC to eliminate the obligation to provide Section 271 elements once “it determines that th[e] requirements [of section 271] have been fully implemented”)

¹¹¹ *See, e.g. Buckman Co v Plaintiffs’ Legal Comm.*, 531 U.S. 341, 353 (2001), *International Paper Co v Ouellette*, 479 U.S. 481, 494 (1987)

¹¹² *See TRO* at ¶ 656, *UNE Remand Order* at ¶ 470; *USTA II*, 359 F 3d at 588-90

explained, this means that, for Section 271 elements, “the market price should prevail.”¹¹³ Thus, a BOC satisfies that federal law standard when it offers Section 271 elements at market rates, terms, and conditions, such as where it has entered in “arms-length agreements” with its competitors.¹¹⁴ Rate-setting by commissions is the opposite of the development of market-based prices discussed in the *USTA II* decision. The two concepts of “market-based” rates on the one hand and “commission-set” rates on the other, are fundamentally at great odds, and this common-sense understanding was precisely what Director Tate discussed in making her motion on the market rate for switching in Docket 03-00119. In that case, Director Tate noted the months of calls to negotiate from then Chairman Powell at the FCC and from the TRA itself and went on to conclude that the only course consistent with those calls was to look to the rate that had actually been negotiated:

DIRECTOR TATE: This dates back to I think Chairman Powell’s first request for the parties to do that, and then I tried to do that as well. Mr. Walker admonished me not to undermine the FBO process, although it is really not very much in my nature because, and you-all know, I really as much more of a mediator.

I have played with cutting the numbers in half. I have thought through this a lot, but in order to, I think, be true to my requests and my philosophies about market-based rates, what I would like to propose is – because from my reading of the record, the only rate that has ever been negotiated was the \$14 rate, and I would propose that we accept that,¹¹⁵

Moreover, the failure by certain CLECs to reach an agreed rate – in contravention of the FCC’s calls for commercial agreements – should not be rewarded. By engaging in any form of state-based, TRA-run rate making, the CLECs are rewarded with the same out-dated regulatory regime rejected by the FCC. Director Kyle’s motion to deny the CLECs’ emergency motion (on No New Adds) recognized that, in order to effectuate the FCC’s decisions, the CLECs had to be

¹¹³ *UNE Remand Order* at ¶ 470, *USTA II*, 359 F 3d at 588-90

¹¹⁴ *TRO* at ¶ 664

¹¹⁵ 03-00119, *DeltaCom Arbitration*, Transcript of Proceedings, June 21, 2004, at 3

told “no”. The CLECs’ cries for more time and for TRA intervention were rightly rejected. As Director Kyle noted:

DIRECTOR KYLE: I am of the opinion that when the *TRRO* is read in total, there are no rates, terms or conditions to be negotiated concerning new adds because the FCC expressly prohibited new adds after March 11, 2005, which has passed. In short, there is nothing to negotiate in those instances where new adds are involved and where the FCC has found CLECs are not impaired if a UNE is not provided by the incumbent. This applies to mass market switching everywhere and also to DS1 & DS3 transport, dark fiber transport and high capacity loops in cases where the FCC has determined no impairment exists. To implement the commission’s rules Bellsouth may withdraw access to new adds, where no impairment exists, anytime after March 11, 2005.¹¹⁶

Permitting “state law to determine the validity of the various terms and conditions agreed upon” by BOCs and their wholesale customers “will create a labyrinth of rates, terms and conditions” that “violates Congress’s intent in passing the Communications Act.”¹¹⁷ This potential for “patchwork contracts” resulting from “the application of fifty bodies of law” “... conflicts with Section 202’s prohibition on providing advantages or preferences to customers based on their ‘locality.’”¹¹⁸ Section 201, moreover, “demonstrates Congress’s intent that *federal law* determine the reasonableness of the terms and conditions” of 271 elements.¹¹⁹

The FCC has clearly recognized this limitation, stating unequivocally that it has “exclusive authority” over “the section 271 process.”¹²⁰ Moreover, clear precedent establishes that the FCC has the power to preempt state determinations where a facility is used both for interstate and intrastate purposes and it is not practicable to regulate those components separately.¹²¹ As the FCC has stated to the Supreme Court, that analysis applies directly to the

¹¹⁶ Docket No 04-00381, Motion of Sara Kyle on April 11, 2005 (attached).

¹¹⁷ *Boomer v AT&T Corp*, 309 F 3d 404, 420 (7th Cir 2002), *see also TRO* at ¶ 664 (question whether BOC’s provision of Section 271 element satisfies sections 201 and 202 requires “a fact-specific inquiry”)

¹¹⁸ *Boomer*, 309 F 3d at 418-19

¹¹⁹ *Id* at 420 (emphasis added)

¹²⁰ *See US West Order*, 14 FCC Rcd at 14401-02, ¶ 18.

¹²¹ *See Louisiana PSC v FCC*, 476 U S 355, 375 n 4 (1986), *Illinois Bell Tel Co v FCC*, 883 F 2d 104, 114-15 (D C. Cir 1989), *North Carolina Utils Comm’n v FCC*, 552 F 2d 1036, 1045-46 (4th Cir 1977)

pricing of facilities that must be provided by ILECs under the 1996 Act. The FCC explained to the Court that it had concluded in the *Local Competition Order* that

it would be economically and technologically nonsensical ... for the FCC and the state commissions to treat the rates for interconnection with and unbundled access to [ILEC] facilities like retail rates, such that the ultimate rate a competing carrier must pay an incumbent LEC would reflect a combination of an ‘intrastate’ rate set by a state commission and an ‘interstate’ rate set by the FCC.¹²²

Accordingly “*the [FCC] may ensure effective regulation of the interstate component ... by preempting inconsistent state regulation of the matter in issue.*”¹²³ The Supreme Court agreed that the FCC had the authority to resolve such matters under the 1996 Act and thus to “draw the lines to which [state commissions] must hew.”¹²⁴

This limitation on state rate-making authority must be given effect. If Congress had wanted state commissions to set rates for “purposes of subsection (c)(3) of such section [251]” *and* separately for purposes of the competitive checklist contained in subsection (c)(2)(B) of section 271, it could easily have said so. It said nothing of the kind. As the Supreme Court has explained in a related context involving the relationship between Sections 251 and 271, “Congress’ decision to omit cross-references [is] particularly meaningful” in this context, given that such cross-references are plentiful elsewhere in the relevant provisions.¹²⁵

Indeed, *nowhere* in the federal statute are states authorized to impose any obligations, much less to set rates, to ensure compliance with section 271 – a provision that, as the FCC and

(“NCUCII”) See also *Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No. 03-251, released March 25, 2005 (“*DSL Preemption Order*”) (The FCC recently described its preemption power, explaining, in paragraph 19, that “in addition to section 251(d)(3) jurisdiction in the 1996 Act, Congress accorded to the [FCC] direct jurisdiction over certain aspects of intrastate communications pursuant to section 251 of the 1996 Act. We conclude that the plain language of section 251 and of the *Triennial Review Order* empowers the [FCC] to declare whether a state commission decision is inconsistent with or substantially prevents implementation of the Commission’s unbundling rules.”)

¹²² *Opening Brief for the Federal Petitioners*, FCC v. Iowa Utils. Bd., No. 97-831, at 36-37 (U.S. filed Apr. 3, 1998) (“FCC S. Ct. Brief”).

¹²³ *Id.* at 36 (emphasis added).

¹²⁴ *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

¹²⁵ *Id.*

the D.C. Circuit have emphasized, contains obligations that are independent of section 251.¹²⁶ Rather, as confirmed by the *limited* authority granted to the states by section 252, all authority to implement those separate requirements in section 271 is vested with the FCC.

Therefore, even if state commissions had authority to require ILECs to include Section 271 elements in an Section 252 interconnection agreement (which they do not), the state commissions, as a matter of law, have no authority to set rates for those elements. Perhaps most importantly, the TRA, even if it *could*, *should* not be fooled into accepting the CLECs' invitation to set rates that the FCC has decided should be set by the market.

- C. **Issue 8(c): Section 271** *If the answer to 8(a) or (b) is affirmative in any respect, (i) what language, if any, should be included in the ICA with regard to the rates for such elements; and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?*

Relevant Contract Provisions: PAT-1 Section 1.1; PAT-2 Section 1.1

Based upon the language in the Act, the applicable federal court decisions, and the majority of state commission decisions, there is no basis whatsoever to require BellSouth to include language addressing Section 271 obligations in Section 252 interconnection agreements over BellSouth's objection. BellSouth's proposed contract language properly recognizes that its unbundling obligations are performed "in accordance with its obligations under Section 251(c)(3) of the Act."¹²⁷ Because the Authority cannot legally answer issues 8(a) and (b) in the affirmative, this subpart (c) must be resolved in BellSouth's favor.

The Authority cannot and should not address the rates, terms, and conditions that govern BellSouth's Section 271 obligations, and what the CLECs speciously propose to do – extend the "interim" rates established in the DeltaCom Arbitration to the general CLEC community –

¹²⁶ See *Id.* at 17385-86, ¶ 655 ("section 251 and 271 operat[e] independently"), *USTA II*, 359 F.3d at 588 ("The FCC reasonably concluded that checklist items four, five, six, and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52.")

¹²⁷ PAT-1, Section 1.1

cannot pass muster. The CLECs seek to extend the FCC's transitional rates – rates that unequivocally end at a date certain – beyond their ending date until some unknown rate setting proceeding occurs and permanent state commission 271 rates are ordered. Moreover, the CLECs cannot justify their “interim” rate proposal by claiming that the FCC's transitional rates are close to the DeltaCom rates or by relying on testimony Bellsouth filed in South Carolina (this testimony was never even entered into the evidentiary record). The FCC has addressed various CLEC “just and reasonable” rate claims in its appellate papers filed in the D.C. Circuit Court of Appeals and explained:

The CLECs dispute the [FCC's] finding that unbundled mass market switching creates investment disincentives. They contend that TELRIC rates are much higher than the [FCC's] analysis suggests. The CLECs' characterization of TELRIC rates is just not credible. If (as the CLECs assert) TELRIC switching rates are at or above "the upper end" of a "just and reasonable range", then presumably CLECs would have stopped paying high UNE rates and started serving their mass market customers with the switches they had already purchased and deployed to serve enterprise customers.

* * * *

The CLECs question the reasonableness of *any* rate increase. They assert that rates for unbundled switching were already at or above the "high end" of "the just and reasonable range" before the FCC prescribed the interim rate increase ... The CLECs' own conduct is inconsistent with their claim that TELRIC-based switching rates are high or excessive. THE CLECs continued to pay TELRIC rates even though they could have served their mass market customers with non-ILEC switches that they had already purchased and deployed to serve enterprise customers. Competitors' persistent reliance on UNE-P - even after extensive deployment of competitive switches – provides powerful evidence that TELRIC-based switching rates were not even close to "the high end" of the permissible range of rates under the "just and reasonable" standard of section 201(b).¹²⁸

As the FCC makes clear, using rates that are at, or close to TELRIC, are not to perpetuate the investment disincentives that existed under the UNE-P regime. CompSouth's attempt to obtain such rates shows that it wishes to evade the regulatory changes mandated by the *TRRO*.

¹²⁸ *Brief of the FCC, Respondents, United States District Court of Appeals, District of Columbia Circuit, Case No 05-1095*, pp 32, 36 (citations omitted), *oral argument scheduled Feb 26, 2006*

Just as the CLECs tried to avoid the definitive start date of the *TRRO*, this is simply an attempt to circumvent the ending date, in an effort – in the words of the Eleventh Circuit – “to cram as many new customers as possible before they are forced to bow to the inevitable.”¹²⁹ This clinging to the former regulatory regime also undermines the results of BellSouth’s commercial negotiations – negotiations that have resulted in over one hundred and fifty agreements.¹³⁰ The Authority cannot and should not allow such an outcome.

The TRA has recognized that the FCC meant what it said about the No New Adds date, and it must likewise recognize that the FCC’s end date for imposing transitional rates is equally important. It is clear that the FCC intended that those rates convert to market rates at that point. Had the FCC intended the transitional rates to last until replaced by state-set rates, it would have said so. It did not say so, because that is not what the law requires. Having recognized that the de-listed UNEs should not be required to be provided at the rates previously in place, due to their adverse impact on competition, the FCC set a firm end date to its transition plan, which states must not ignore.

D. Issue 14: Commingling: *What is the scope of commingling allowed under the FCC’s rules and orders and what language should be included in Interconnection Agreements to implement commingling (including rates)?*

Relevant Contract Provisions: PAT-1 Section 1.11, PAT-2 Section 1.11

BellSouth allows *real* commingling, but that’s not what the CLECs are seeking. The CLECs attempt to shoe-horn their UNE-P theory into commingling in order to preserve what the FCC clearly intended to end. In contrast, as Ms. Tipton’s testimony makes clear,

¹²⁹ *Eleventh Circuit Order* at * 13

¹³⁰ Blake Rebuttal at 3

BellSouth's proposed contract language properly implements the FCC's commingling definition.¹³¹

The CLECs have tried to hide the ball on this issue by dressing up their 271 argument as a commingling argument, but the TRA Staff's questions to BellSouth's witness Ms. Tipton, by Colleen Edwards, clearly cut through the CLECs' subterfuge:

Q. Okay. Help me with commingling a little bit. I'm trying to understand exactly what BellSouth's position is. Is it BellSouth's position that with regard to commingling do you have an objection to a CLEC commingling UNE-T1s with special access transport or visa versa?

A. No, we do not.

Q. Not an issue?

A. Not at this issue.

Q. How about do you have an issue with commingling UNE loops with stand-alone switching?

A. Yes, we do, because – except as offered in a commercial arrangement, which we are doing via our commercial agreement – our DSO platform agreement, but because switching has been eliminated as a UNE whether stand-alone or offered in combination as a 271 element the check list is very clear that we have no obligation to combine that with a loop or anything else. So when offered under – as a 271 element we certainly have a commercial opportunity to do that and we are doing it because we like to keep carriers on our network, but the FCC did not eliminate UNE or UNE-P in particular as a 251 element just to have it re-created.

Q. What about switching not combined, just commingled? Would you make – let's try to illustrate this so it makes sense. Hypothetically speaking, if I was a CLEC and I was collocated but I didn't have a switch in the area and I wanted to go ahead and buy a stand-alone switching and I was going to combine that, would you be able to go ahead and take that switch port and put it someplace where I could go ahead and I could combine it directly to the loop that I ordered?

A. Oh, absolutely yes. In that scenario you described, we still deliver unbundled switching to a collocation cage as we have always done, so a carrier could combine those two elements themselves.

¹³¹ Tipton Direct at 47 – 51, Tipton Rebuttal at 39 – 40

Q. Okay, Excellent.¹³²

As demonstrated by these questions and answers, BellSouth is providing commingling to the extent of its obligations.

CompSouth's contract language cannot and should not be adopted by the Authority. CompSouth's language would improperly assert state commission authority over Section 271 obligations and would resurrect UNE-P, which is completely inappropriate, as discussed above in response to Issue 8. To the extent that CompSouth's language includes commingling of Section 251 loops or transport UNEs with Section 271 loops or transport checklist items, the CLECs' proposed terminology is simply a red herring, designed to deflect attention from the CLECs' attempt to resurrect UNE-P under the guise of commingling.

The overreaching problem with CompSouth's proposed contract language is that it improperly asserts state commission regulation over Section 271 obligations. As discussed extensively in connection with Issue 8, above, the Authority cannot regulate the terms by which BellSouth complies with its Section 271 obligations. Because the FCC alone has that authority, the Authority must reject out of hand any suggestion that Section 271 services must be commingled with other UNEs.

Even if the Authority had some Section 271 authority (which it does not), a careful review of commingling indicates BellSouth has no obligation to commingle 251 services with 271 services. Although the FCC enacted its federal commingling rule in connection with the *TRO*, the term "commingling" was first used in the FCC's *Supplemental Order on Clarification*, FCC 00-183, CC Docket No. 96-98 (rel. June 2, 2000) ("*SOC*"). There, the FCC discussed commingling as combining loops or loop-transport combinations with *tariffed special access services*

¹³² *Tr* Vol IV, at 10-11

We further reject the suggestion that we eliminate the prohibition on “commingling” (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above.”¹³³

By using the phrase “*i.e.*”, which commonly means, “that is,” the FCC in the *SOC* understood commingling as referring to a service combination that expressly included tariffed access services.

The FCC’s discussion of commingling in the *TRO* was ultimately consistent with its discussion in the *SOC* as explained more fully below. In the *TRO*, the FCC explained that commingling meant

the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the *combining* of a UNE or UNE combination with one or more such wholesale services.¹³⁴

Thus, despite the CLEC attempts to create a distinction between an ILEC’s commingling obligation and the combination obligation,¹³⁵ the FCC used the terms interchangeably.¹³⁶

The FCC was very clear that BellSouth and other RBOCs have no obligation to combine 271 elements or to combine elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act. (“We decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251.”).¹³⁷

This aspect of the FCC’s ruling was upheld on appeal; the appellate court explained that the FCC

¹³³ *SOC* at ¶ 28

¹³⁴ *TRO*, ¶ 579 (emphasis added)

¹³⁵ See Gillan Direct at 49-51.

¹³⁶ Mr. Gillan’s testimony on this point is illogical. He describes the FCC’s use of the terms combining and commingling as a matter of “semantic construction,” claims BellSouth is “not technically required to ‘combine’ § 271 elements,” then claims BellSouth has an obligation to “connect § 271 elements.” Gillan Direct at 49. Mr. Gillan’s word choice – connect, instead of combine – is of no consequence. The definition of commingling at 47 C.F.R. § 51.5 includes “the combining of an unbundled network element . . . with one or more such facilities or services.” Since Mr. Gillan testifies that BellSouth is not required to “combine” § 271 elements, and the definition of commingling includes the obligation of combining a UNE with other facilities or services, Mr. Gillan effectively concedes BellSouth has no obligation to commingle § 271 network elements with UNEs.

¹³⁷ See *TRO* at ¶ 655, n. 1989. The *TRO*, as originally issued, had this language at note 1990. After the *TRO* Errata the footnotes were renumbered, and the remaining language appears at note 1989.

had “decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements.”¹³⁸

The strained argument of the CLECs on this point is telling. In an effort to cloud this issue, CLECs make a “double-strike” argument that cannot pass muster. The argument centers on two deletions from the *TRO*, which deletions were made in the *TRO Errata*. Prior to its *Errata*, the FCC originally stated,

[a]s a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements *unbundled pursuant to section 271* and any services offered for resale pursuant to section 251(c)(4) of the Act.¹³⁹

Notably, when the *Errata* was issued however, the phrase “unbundled pursuant to section 271” *was deleted*.¹⁴⁰ Thus, the language of the *TRO*, as corrected by the *Errata*, requires

incumbent LECs [to] permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements and any services offered for resale pursuant to section 251(c)(4) of the Act.

Hence, the first “strike.”

The second “strike” also occurred in the *TRO Errata*. At the same time the FCC deleted the phrase “unbundled pursuant to Section 271” from its discussion of commingling in paragraph 584 of the *TRO*, it also deleted the sentence, “We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to these checklist items” from its discussion in the section 271 portion of the *TRO*.¹⁴¹ The CLECs make the absurd argument that, read together, the two deletions were intended to correct any potential conflict. That argument cannot stand – had the FCC desired to impose some type of commingling, or

¹³⁸ *USTA II*, 359 F 3d at 589. Significantly, the Section 271 checklist obligates BellSouth to provide local loop transmission “unbundled from local switching and other services”, local transport “unbundled from switching or other services”, and switching “unbundled from transport, local loop transmission or other services”

¹³⁹ *TRO* at ¶ 584 (emphasis supplied)

¹⁴⁰ *TRO Errata*, at ¶ 27

¹⁴¹ See *TRO*, n. 1989 (prior to the *TRO Errata*, this was footnote 1990).

combining obligation on BellSouth it would have only needed to delete the language at footnote 1990, yet retain its original language in paragraph 584, which, as originally issued, appeared to impose an obligation to commingle UNEs with Section 271 network elements. That was not the course the FCC took – it made two deletions, one of which clearly removed any commingling of Section 251 UNEs with Section 271 network elements.

Ultimately, by making its deletions, the federal commingling rule issued by the *TRO* became entirely consistent with the discussion of commingling in the *SOC*. That is because the words wholesale services are repeatedly referred to as tariffed access services. Thus, when the CLECs attempt to ignore the FCC's deletion and focus on the words "wholesale services" their reliance cannot stand. Although the CLECs contend wholesale services must include Section 271 obligations, the FCC clearly intended to limit the types of wholesale services that are subject to commingling. This is because, in describing wholesale services in the *TRO*, the FCC referred only to *tariffed access services*, just as it had in the *SOC*, explaining, in relevant part, as follows.

First,

We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff).

Next,

Competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special access services offered pursuant to tariff).

Third,

We do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (*e.g.*, a ... circuit at rates based on special access services and UNEs).

Then,

We require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.

Finally,

Commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services.¹⁴²

The foregoing passages, along with the deletion of Section 271 in the description of commingling in the *Errata*, show clearly that the FCC never intended for ILECs to commingle Section 271 elements with Section 251 UNEs. Moreover, language within the *TRRO*, read in conjunction with the *TRO*, is consistent. In addressing conversion rights in the *TRO*, the FCC referred to “wholesale services,” concluding, “Carriers may both convert UNEs and UNE combinations to *wholesale services* and convert wholesale services to UNEs and UNE combinations”¹⁴³ Then, when describing this conversion holding in the *TRRO*, the FCC explicitly limited its discussion to the conversion of *tariffed services* to UNEs: “We determined in the *TRO* that competitive LECS may convert *tariffed incumbent LEC services* to UNEs and UNE combinations”¹⁴⁴ It is clear, therefore, that the FCC narrowly interprets “wholesale services” as limited to tariffed services, and it does not expect or require BellSouth to combine or commingle Section 271 network elements with Section 251 network elements.¹⁴⁵

Any other interpretation of BellSouth’s commingling obligation would undermine the FCC’s findings in the *TRRO* that decline to require unbundling of UNE-P due to the investment

¹⁴² *TRO* at ¶¶ 579 – 581, 583

¹⁴³ *TRO* at ¶ 585 (emphasis supplied)

¹⁴⁴ *TRRO* at ¶ 229 (emphasis supplied)

¹⁴⁵ Because BellSouth satisfies its Section 271 loop and transport obligations through its tariffed access services, BellSouth combines a Section 251 loop with tariffed transport, which transport happens to serve as BellSouth’s Section 271 offering. That is why the CLECs’ listing of loop and transport commingling arrangements they propose to include in contracts is a red herring. The CLECs know full well that BellSouth already connects 251 UNEs with tariffed access services. Indeed, CLECs have no need for any “retroactive” commingling language for that reason.

disincentives previous unbundling rulings had created.¹⁴⁶ Significantly, if BellSouth is required to combine or commingle 251 elements – such as loops – with services BellSouth provides only pursuant to Section 271 – such as switching – the result will be to effectively recreate UNE-P under the guise of commingling. The FCC made clear in the *TRRO*, however, that there is “no section 251 unbundling requirement for mass market local circuit switching nationwide.”¹⁴⁷ And, both the New York Public Service Commission as well as the Mississippi Federal District Court have indicated that the “FCC’s decision ‘to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to 271-based UNE-P arrangements.’”¹⁴⁸ UNE-P is abolished and state commissions cannot recreate it disguised as a Section 271 commingling obligation.

The North Carolina Utilities Commission Panel has recently addressed this issue in a proceeding between BellSouth and NuVox in Docket No. P-772, Sub 8, finding:

The Commission believes that ... the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements. After careful consideration, the Commission finds that there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.¹⁴⁹

The Florida Commission reached the same conclusion in an analogous arbitration:

In paragraph 584 of the *TRO*, the FCC said “as a final matter we require the incumbent LECs to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to Section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act.” The FCC’s errata to the *TRO* struck the portion of paragraph 584 referring to ‘... any network elements unbundled pursuant to Section 271’ The removal of this language illustrates that the FCC did not intend commingling to apply to Section 271 elements that are no longer also

¹⁴⁶ *TRRO* at ¶ 218

¹⁴⁷ *TRRO* at ¶ 199

¹⁴⁸ *BellSouth v. Mississippi Public Serv. Comm’n*, Civil Action No. 3:05CV173LN at 16-17 (stating that the court would agree with the New York Commission’s findings) (quoting *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y.P.S.C. (Mar. 16, 2005))

¹⁴⁹ See NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order* at 24.

required to be unbundled under section 251(c)(3) of the Act. ***Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to section 271.***¹⁵⁰

The Florida Commission reasoned that the elimination of UNE-P justified adopting BellSouth's position on commingling:

Further, we find that connecting a section 271 switching element to a section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential recreation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition.¹⁵¹

In reaching this conclusion, the Florida Commission explained:

COMMISSIONER EDGAR * * * *

So ... I think we need to do is look at in the larger context, and that the language at issue should be interpreted within the larger context of FCC decisions and direction, and in keeping with this Commission's recognition of that direction.

Recreating UNE-Ps or UNE-P type service provisions, I believe, is in contradiction to the goals of the FCC and the direction that they have laid out in the TRO and as followed through with the errata that came after than. I also don't believe that the CLECs are significantly disadvantaged by removing 271 services from those services that must be commingled with UNEs or with UNE combinations. 271 services will continue to be available from BellSouth through special access tariffs or commercial agreements.¹⁵²

¹⁵⁰ FPSC Order No PSC-05-0975-FOF-TP at 19 (October 11, 2005) (emphasis added)

¹⁵¹ FPSC Order No PSC-05-0975-FOF-TP at 19.

¹⁵² Florida Commission Transcript of Aug 30, 2005 Agenda Conference, Docket No 040130-TP, released Sept 16, 2005

The Kansas Commission also addressed commingling, ruling: (1) Southwestern Bell Texas ("SWBT") was "not under the obligation to include 271 commingling provisions in successor agreements"; (2) "271 commingling terms and conditions had *no home* in [interconnection] agreements"; and (3) if it ordered SWBT to provide commingling and SWBT refused the commission "would have no enforcement authority against SWBT because that authority ... resides with the FCC."¹⁵³ The Authority should reach the same conclusion here.

E. **Issue 17: Line Sharing:** *Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?*

Relevant Contract Provisions: EF-1 Section 3.1.2

The FCC has made it quite clear that BellSouth has no obligation to provide new line sharing arrangements after October 1, 2004.¹⁵⁴ The TRA has also clearly ruled on the line sharing issue finding that the FCC's transition plan is determinative of BellSouth's obligations.¹⁵⁵ The CLECs seek to have the TRA reverse both its own course (established by the unanimous order in the Covad Arbitration)¹⁵⁶ and the FCC's course.

BellSouth asks the Authority to implement this aspect of the *TRO* and require CLECs to either eliminate line sharing from their interconnection agreements entirely if a CLEC has no line sharing arrangements in place, or to include language that implements the *TRO*'s binding transition mechanism for access to the high frequency portion of the loop ("HFPL") if a CLEC

¹⁵³ See *Kansas Order* at ¶¶ 13-14 (emphasis added) BellSouth acknowledges the Kentucky Public Service Commission in its region, and other state commissions outside it region have required commingling of Section 251 UNEs and Section 271 obligations BellSouth has asked the Kentucky Commission to rehear and correct its ruling, which is contrary to law. Also, some states, although they have properly recognized their lack of Section 271 authority have nonetheless erroneously determined that ILECs must allow requesting carriers to commingle Section 251(c)(3) UNEs with Section 271 elements E.g., *Washington Covad/Qwest Decision*, *Massachusetts Arbitration Order*

¹⁵⁴ Fogle Direct at 5, citing *TRO* at ¶¶ 199, 260-252, 264-265

¹⁵⁵ Docket No 04-00186, *Order* dated July 20, 2005 Director Tate properly declined to support Covad's request that this *Order* be reconsidered. (*Tr* Agenda Conference, August 22, 2005, p 12)

¹⁵⁶ *Order*, July 20, 2005, 04-00186

has active line sharing arrangements.¹⁵⁷ BellSouth's request is both reasonable and appropriate, particularly given that only nine CLECs region wide have active line sharing arrangements in place,.

In an effort to avoid implementing the *TRO* and the federal rules concerning line sharing, however, the CLECs (primarily Covad) claim that line sharing is a Section 271 obligation. This argument fails. The language of Section 271 does not require line-sharing. Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services."¹⁵⁸ The FCC has authoritatively defined the "local loop" as a specific "transmission facility" between a LEC central office and the demarcation point on a customer premises.¹⁵⁹ BellSouth thus meets its checklist item 4 obligations by offering access to unbundled loops and the "transmission" capability on those facilities.¹⁶⁰ The CLECs argue that because the HFPL is "a complete transmission path," that it constitutes "a *form of* 'loop transmission facility'" under checklist item 4. This argument makes no sense. To make it, the CLECs must ignore the portion of the definition of HFPL that defines HFPL as a "complete transmission path *on the frequency range above the one used to carry analog circuit switched voice transmissions*" In other words, the HFPL is only part of the facility – not the entire "transmission path" required by checklist item 4.

¹⁵⁷ Fogle Direct at 8-9.

¹⁵⁸ 47 U.S.C. § 271(d)(2)(B)(iv)

¹⁵⁹ 47 C.F.R. § 51.319(a).

¹⁶⁰ The Joint CLECs cite to FCC 271 orders for the proposition that line sharing is a Section 271 obligation, yet offer no explanation for the fact that neither New York nor Texas were required to offer line sharing to obtain Section 271 approval. If line sharing actually had been required in order to receive long distance authority under checklist item 4, then the FCC could not have granted Verizon and SBC Section 271 authority. See *In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, 15 FCC Rcd 3953 (Dec. 22, 1999), *In the Matter of Application by SBC Communications, Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, 15 FCC Rec'd 18354 (June 30, 2000).

A simple but appropriate analogy makes the point – it is as if one ordered a birthday cake from a bakery but received only the icing. Certainly the buyer would not consider the icing alone a “form” of birthday cake. On the contrary, the requirement was a whole cake, not just a portion of it, just as checklist item 4 requires the entire transmission facility, not just the high frequency portion of the transmission facility.

Notwithstanding federal law, Covad and other CLECs flatly refuse to include the FCC’s transition plan in Section 252 interconnection agreements, thus necessitating a resolution of this issue. Notably, neither Covad nor any other CLEC witness filed testimony that explained their view.¹⁶¹ They offered nothing during the change of law hearing that would require the Authority to reverse course and rule in a manner inconsistent with its ruling in the Covad Arbitration. Instead, CompSouth’s witness filed contract language addressing the issue, but readily acknowledged he did not sponsor any testimony (aside from his support of Covad’s Section 271 line sharing theory) to support his proposed contract language.¹⁶²

Beyond the obvious fact that line sharing cannot credibly consist of a form of loop transmission, the CLEC argument is that, notwithstanding the clear language of the FCC in its *TRO*, CLECs can obtain the HFPL indefinitely and at rates other than the ones the FCC specifically established in its transition plan simply by requesting access to those facilities under section 271 instead of section 251.¹⁶³ This position is deeply illogical and inconsistent with both the statutory scheme and the FCC’s binding decisions.

¹⁶¹ See *Tr* Vol IV, at 60 Q Can you actually point me to a page reference in your rebuttal testimony where you reference Issue 17 or 18? A No, I cannot, although I can assure you it was supposed to be in there, at least that one point.

¹⁶² Gillan Deposition, Hearing Exhibit 4 at 77.

¹⁶³ While many CLECs have interconnection agreements that contain line sharing language that needs to be amended, only nine CLECs have active line sharing arrangements in place in BellSouth’s region

First, if for no other reason, the CLECs' argument must fail for the same reason that it fails in response to Issue 8(a). Even if line sharing could be construed to be a Section 271 network element, the state commissions have no authority to require an ILEC to include Section 271 elements in a Section 252 interconnection agreement.

Second, if that is not sufficient, the CLECs' theory that line sharing is still available as a Section 271 element is illogical because it would render irrelevant the FCC's carefully-calibrated transition plan to wean CLECs away from the use of line-sharing and to transition them to other means of accessing the FCC's facilities, such as access to whole loops and line-splitting, that do not have the same anti-competitive effects that the FCC concluded are created by line-sharing. As the FCC explained, "access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled *creates better competitive incentives*."¹⁶⁴ Because of the inherent difficulties in pricing access to just the HFPL (difficulties that exist regardless whether access is required under Section 251 or, as Covad claims, under Section 271), allowing competitive LECs to purchase a whole loop or to engage in line-splitting "but *not* requiring the HFPL to be separately unbundled" puts CLECs "in a more fair competitive position."¹⁶⁵

Indeed, the FCC expressly found continued unlimited access to line-sharing to be *anticompetitive* and contrary to the core goals of the 1996 Act. Allowing continued line sharing

would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that *such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets*.¹⁶⁶

There is no basis to conclude that the FCC, having eliminated these anti-competitive consequences under Section 251, has allowed these *same* untoward effects to go on unchecked

¹⁶⁴ *TRO* at ¶ 260 (emphasis added)

¹⁶⁵ *Id*

¹⁶⁶ *Id* ¶ 261 (emphasis added)

under Section 271. On the contrary, subsequent FCC orders confirm that the federal agency continues to believe that it has required CLECs to obtain, in lieu of line sharing, a whole loop or engage in line-splitting. Thus, in its very recent *BellSouth Declaratory Ruling Order*,¹⁶⁷ the FCC again stressed that, under its rules, “a competitive LEC officially leases the entire loop.”¹⁶⁸ Moreover, far from suggesting an open-ended Section 271 obligation to allow line-sharing, this very recent FCC decision reiterates that line sharing was required “*only* under an express three-year phase out plan.”¹⁶⁹ The FCC’s statement cannot be squared with the notion that line-sharing is also required indefinitely under Section 271.

Moreover, there is not a single mention of line sharing in Section 271. It bears repeating that, by its plain text, Section 271 does not require line-sharing when such access is no longer mandated as a separate UNE (and thus required under Section 271 checklist item 2). Instead, checklist item 4 requires BOCs to offer “local loop transmission, unbundled from local switching and other services.”¹⁷⁰ The FCC has authoritatively defined the “local loop” as a specific “transmission facility” between a LEC central office and the demarcation point on a customer premises.¹⁷¹ BellSouth thus meets its checklist item 4 obligation by offering access to complete loops and thus all the “transmission” capability on those facilities. Nothing in checklist item 4 requires more.

But even if (hypothetically) Section 271 did require line-sharing, the FCC’s recent forbearance decision would have removed any such obligation.¹⁷² BellSouth understands that Covad disputes the fact that line sharing is included in the relief granted in the *Broadband 271*

¹⁶⁷ See *Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No. 03-251 (Mar. 25, 2005) (“BellSouth Declaratory Order”).

¹⁶⁸ (¶ 35)

¹⁶⁹ *Id.* ¶ 5 n. 10 (emphasis added)

¹⁷⁰ 47 U.S.C. § 271(d)(2)(B)(iv)

¹⁷¹ 47 C.F.R. § 51.319(a)

¹⁷² *Memorandum Opinion and Order*, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 (“*Broadband 271 Forbearance Order*”).

Forbearance Order. A review of the record in that case, however, demonstrates that the relief granted extended to all broadband elements, including the HFPL. As stated by Chairman (then Commissioner) Martin:

While the Commission did not specifically address line sharing in today's decision, the Bell Operating Companies had included a request in their petitions that we forbear from enforcing the requirements of section 271 with respect to line sharing [citing *Verizon Petition for Forbearance*]. Since line-sharing was included in their request for broadband relief and we affirmatively grant their request, I believe today's order also forbears from any Section 271 obligation with respect to line-sharing. Regardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute.¹⁷³

As stated by Chairman Martin, the Bell Operating Companies, including, BellSouth included line sharing in their *Petitions for Forbearance* filed with the FCC, and the relief granted therefore also included line sharing. BellSouth's Petition in particular "[sought] forbearance from the same broadband elements as sought by Verizon,"¹⁷⁴ and was patterned after an earlier petition filed by Verizon. Verizon's petition, in turn, asked the FCC to forbear from imposing any 271 obligation on the broadband elements that the FCC had eliminated in the *TRO*. BellSouth's FCC Petition likewise requested, in relevant part, that:

[T]o the extent the Commission determines § 271(c)(2)(B) to impose the same unbundling obligations on BOCs as established by § 251(c) that the Commission forbear from applying any stand-alone unbundling obligations on broadband elements. ***While BellSouth believes that no such obligations exist, it files this***

¹⁷³ Statement of Commissioner Kevin J. Martin, *Broadband 271 Forbearance Order Id*, BellSouth acknowledges that the separate statement of former FCC Chairman Powell – which statement was amended *after* the FCC issued a press release concerning the adoption of the *Broadband 271 Forbearance Order* – conflicts with Chairman Martin's statement. Mr. Powell's amended statement, however, does not address Section 160(c) of the Act, which obligates the FCC to rule on forbearance petitions within fifteen months of the filing date of the petition. Moreover, the FCC did not deny any part of the BellSouth petition that asked for forbearance for all broadband elements de-listed under Section 251. Consequently, the lack of any additional language that explicitly addresses line sharing means that the FCC must forbear from enforcing any 271 obligations that may exist with respect to line sharing, as recognized by Chairman Martin. Also, while Mr. Powell indicated that line sharing is excluded from the Broadband 271 Forbearance Order, he did not explain the basis for his conclusion nor did he address the legal argument that the FCC's failure to deny the petitions results in granting forbearance for line sharing as well as the other cited elements. In contrast, Chairman Martin's statement was supported by applicable law.

¹⁷⁴ *Broadband 271 Forbearance Order*, at ¶ 9

Petition in an abundance of caution to ensure that the Commission does not impose such obligations where there is ample evidence to demonstrate that the unbundling obligations required by § 251 are unnecessary to meet the purpose of § 271. Through this Petition, BellSouth is seeking the same relief requested by Verizon in its Petition for Forbearance filed October 1, 2003.

(emphasis added).

In its forbearance order, the FCC stated that,

[a]lthough Verizon's Petition was ambiguous with regard to the exact scope of the relief requested, later submissions by Verizon clarify that Verizon is requesting forbearance relief only with respect to those broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under section 251(c).¹⁷⁵

In this regard, the FCC cited to a March 26, 2004 *ex parte* letter filed by Verizon. In relevant part, Verizon's March 26, 2004 letter included a white paper that specifically referred to line sharing. Indeed, referring to *USTA II*, Verizon stated:

[t]he court reached similar conclusions with respect to ***other broadband elements. ... with respect to line sharing***, the court again concluded that, even if CLECs were impaired to some degree without mandatory line sharing, the Commission had properly concluded given the 'substantial intermodal competition from cable companies' that, 'at least in the future, line sharing is not essential to maintain robust competition in this market.'¹⁷⁶

BellSouth's request for relief, which relies on the Verizon filing, thus includes line sharing.

Indeed, the only logical conclusion is that the RBOCs included in their petitions for forbearance all of the broadband elements the FCC eliminated in the *TRO*. The FCC eliminated unbundling of most of the broadband capabilities of loops in the *TRO*, and its rationale was consistent for each of these capabilities. It eliminated unbundling of fiber-to-the-home loops, the packetized portion of hybrid loops, and packet switching (all broadband elements), based on "the impairment standard and the requirement of section 706 of the 1996 Act to provide incentives for

¹⁷⁵ *Broadband 271 Forbearance Order*, at ¶ 2, n 9

¹⁷⁶ Verizon's March 26, 2004 filing, WC Docket Nos 01-338, 03-235, 03-260, and 04-48

all carriers, including the ILECs, to invest in broadband facilities.”¹⁷⁷ It used the same rationale to eliminate the HFPL broadband element.¹⁷⁸ As stated by the D.C. Circuit Court of Appeals in affirming these portions of the *TRO*:

[t]he Commission declined to require ILECs to provide unbundled access to most of the broadband capabilities of mass market loops. In particular, it decided ... not to require unbundling of the broadband capabilities of hybrid copper-fiber loops, Order ¶¶ 288-89, or fiber-to-the-home (“FTTH”) loops, id. ¶ 273-77, and it also decided not to require ILECs to unbundled the high frequency portion of copper loops, a practice known as “line sharing,” id. ¶¶ 255-63.¹⁷⁹

As noted in the *Broadband 271 Forbearance Order*, the D.C. Circuit expressly upheld the FCC’s finding that it was appropriate to relieve the BOCs from the unbundling on a national basis “for the broadband elements at issue.”¹⁸⁰ And the D.C. Circuit Court’s opinion clearly contemplates that “the broadband elements at issue” included line sharing.¹⁸¹ There is simply no rational basis for excluding one broadband element – line sharing – from the broadband relief the FCC granted.

Likewise, there is every reason to conclude that the FCC did, in fact, forbear from imposing any Section 271 obligations on each of these broadband elements. The benefits to broadband competition of forbearing from imposing 271 obligations on the fiber loop elements apply equally to forbearance of line sharing arrangements. For example, the FCC held that:

The [FCC] intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.¹⁸²

¹⁷⁷ *Broadband 271 Forbearance Order* at ¶ 7, citing *TRO* at ¶¶ 242 – 44

¹⁷⁸ *TRO* at ¶¶ 258 – 63

¹⁷⁹ 359 F 3d 554, at 226

¹⁸⁰ *Broadband 271 Forbearance Order*, n 73, citing *USTA II*, 359 F 3d at 578 – 85

¹⁸¹ The D C Circuit’s discussion of the CLEC challenges to “Unbundling of Broadband Loops” includes hybrid loops, fiber-to-the-home loops, and line sharing *USTA II* at 578 – 85

¹⁸² *Broadband 271 Forbearance Order* at ¶ 34

This holding mirrors the FCC's conclusion about the effect of removing line sharing from the UNE list in the *TRO*.¹⁸³ The FCC also explained "[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal platforms to become increasingly a substitute for ... wireline broadband service."¹⁸⁴ Finally, the FCC concluded:

Broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs. We expect forbearance from section 271 unbundling will encourage the BOCs to become full competitors in this emerging industry and at the same time substantially enhance the competitive forces that will prevent the BOCs from engaging in unjust and unreasonable practices at any level of the broadband market.¹⁸⁵

Just as forbearance from 271 obligations for fiber to the home and fiber to the curb loops is good for broadband competition, so is forbearance from any line sharing obligations.

Even if the FCC's forbearance order did not expressly address line sharing, under Section 160(a), any petition for forbearance not denied within the statutory time period is deemed granted.¹⁸⁶ Thus, as explained by Chairman (then Commissioner) Martin in his concurring statement,

regardless of whether it was affirmatively granted, because the [FCC's] decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute.

Neither Covad nor any other CLEC can identify any place where the FCC denied the forbearance petition as to line-sharing. Thus, as a matter of law, the petition was granted as to that functionality.¹⁸⁷

¹⁸³ *TRO* at ¶ 263 ("we anticipate that the [FCC's] decisions in this Order and other proceedings will encourage the deployment of new technologies providing the mass market with even more broadband options")

¹⁸⁴ *Broadband 271 Forbearance Order* at ¶ 22

¹⁸⁵ *Broadband 271 Forbearance Order* at ¶ 29

¹⁸⁶ 47 U.S.C. § 160(c) ("[a]ny such petition shall be deemed granted if the Commission does not deny the petition.")

¹⁸⁷ Covad seeks to persuade the TRA that Chairman Martin's view is "manifestly incorrect" in its motion for reconsideration. *Motion to Reconsider*, August 4, 2005, 04-00186

Finally, as in Tennessee, commissions in Massachusetts, Michigan, Rhode Island and Illinois support BellSouth's position.

In Tennessee, this issue has already been decided by the TRA , in addressing a dispute between BellSouth and Covad. The TRA determined that the FCC's transition plan constitutes the only obligation BellSouth has regarding line sharing.¹⁸⁸ Likewise, in Rhode Island, Verizon had previously filed tariffs setting forth certain wholesale obligations. Following the *TRO*, Verizon filed tariff revisions, including a revision that eliminated line sharing from the classification as a UNE. Covad objected to Verizon's revision, claiming, as it did in this docket, that Verizon had a Section 271 line sharing obligation. The Rhode Island Commission rejected Covad's arguments and approved Verizon's tariff modifications.¹⁸⁹

Also, the Illinois Commission has rejected CLEC arguments that line sharing is a Section 271 obligation. In relevant part, in an arbitration decision addressing SBC's obligations under the *TRO*, the Illinois Commission held,

as for XO's contention that the ICA should reflect line-sharing obligations under Section 271 and state law, the Commission notes that the HFPL is not a [Section] 271 checklist item ... [p]atently, no reference to Section 271 obligations belongs in the ICA.¹⁹⁰

The Massachusetts Commission directed the parties "to include the [FCC's] line sharing rules verbatim in" interconnection agreement amendments.¹⁹¹ In Michigan, that commission dismissed a CLEC's complaint seeking to force SBC to include new line sharing; the CLEC

¹⁸⁸ Docket No 04-00186, Order dated July 20, 2005. Covad has requested rehearing of this order BellSouth acknowledges that other state commissions have reached different conclusions, however, to the extent that continued line sharing was required based upon state tariffs that preexisted the *TRO* any such decisions are distinguishable.

¹⁸⁹ *Report and Order*, 2004 R I PUC LEXIS 31, *In re Verizon-Rhode Island's Filing of October 2, 2003 to Amend Tariff No 18*, Rhode Island Public Utilities Commission, Docket No 35556 (October 12, 2004)

¹⁹⁰ *In re XO Illinois*, 2004 WL 3050537 (Ill C C Oct 28, 2004)

¹⁹¹ *Massachusetts Arbitration Order*, p 185

claimed SBC had a Section 271 obligation.¹⁹² The Authority should stick with its previous decision on this issue, endorse the FCC's transition plan and make clear that no new line sharing arrangements can be ordered under the federal rules.¹⁹³

- F. **Issue 18: Line Sharing – Transition:** *If the answer to Issue 17 is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?*

Relevant Contract Provisions: EF-1; EF-2

The FCC articulated, as clearly as it could, the transitional plan for line sharing at paragraph 265 of the *TRO*:

The three-year transition period for new line sharing arrangements will work as follows. During the first year, which begins on the effective date of this Order, competitive LECs may continue to obtain new line sharing customers through the use of the HFPL at 25 percent of the state- approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for stand-alone copper loops for that particular location. During the second year, the recurring charge for such access for those customers will increase to 50 percent of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. Finally, in the last year of the transition period, the competitive LECs' recurring charge for access to the HFPL for those customers obtained during the first year after release of this Order will increase to 75 percent of the state-approved recurring rate or the agreed-upon recurring rate for a stand-alone loop for that location. After the transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing. We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary.

¹⁹² *In re Application of ACD Telecom, Inc. against SBC Michigan for its Unilateral Revocation of Line Sharing Service in Violation of the Parties' Interconnection Agreement and Tariff Obligations and For Emergency Relief*, 2005 Mich PSC LEXIS 109, Order Dismissing Complaint * 12-13 (Mar. 29, 2005)

¹⁹³ In a recent Georgia filing, CompSouth referred to decisions in Maine, Pennsylvania, and Louisiana to support its view. Any reliance on a preliminary Louisiana decision is misplaced – BellSouth has requested the Commission review its January 2005 decision, which it has agreed to do. The Maine decision is on appeal, and the Pennsylvania Commission explicitly relied on Verizon's tariff filing as the basis for its decision, recognizing "there is no basis for this Commission to unilaterally sanction removal of line sharing from Verizon PA's tariff under the present state of FCC orders." Docket No. R-00038871C0001 (July 8, 2004) at 20. Indeed, the Pennsylvania Commission explicitly recognized "the state commission's role in . . . regard to [Section 271] is consultative and the ultimate adjudicative authority lies with the FCC." *Id.* at 17.

CompSouth's proposed contract language – unsupported by a shred of explanatory testimony or evidentiary support – completely disregards the FCC's plan, binding federal rules, and the Authority's order in the Covad Arbitration.¹⁹⁴

As shown in connection with Issue 17 above, BellSouth has no obligation to add new line sharing arrangements after October 2004. Accordingly, in order to properly transition existing line sharing arrangements, those CLECs with line sharing customers must amend their interconnection agreements to incorporate both the line sharing transition plan contained in the federal rules and language that requires CLECs to pay the stand-alone loop rate for arrangements added after October 1, 2004.¹⁹⁵

G. Issue 22: Call Related Databases: *What is the appropriate ICA language, if any, to address access to call related databases?*

Relevant Contract Provisions: PAT-1 Section 7

BellSouth's proposed contract language concerning call-related databases ties BellSouth's obligation to provide unbundled access to call related databases to BellSouth's limited obligation to provide switching or UNE-P.¹⁹⁶ Pursuant to the *TRO*, ILECs are not obligated to unbundle call-related databases for CLECs who deploy their own switches.¹⁹⁷ The FCC's rules provide that ILECs must only provide access to signaling, call-related databases, and shared transport facilities on an unbundled basis to the extent that local circuit switching is unbundled.¹⁹⁸ This decision applies on a nationwide basis, both to enterprise and mass-market

¹⁹⁴ See Fogle Rebuttal at 6

¹⁹⁵ Fogle Direct at 8 – 9, Fogle Rebuttal at 7

¹⁹⁶ See PAT-1 Section 7 1, Tipton Direct at 56 – 58

¹⁹⁷ *TRO* at ¶ 551 (“[w]e find that competitive carriers that deploy their own switches are not impaired in any market without access to incumbent LEC call-related databases, with the exception of the 911 and E911 databases as discussed below”)

¹⁹⁸ 47 C F R 51.319(d)(4)(i)

switching.¹⁹⁹ Consequently, interconnection agreements should not contain any language regarding the provision of unbundled access to call-related databases other than 911 and E911.

The D.C. Circuit affirmed the FCC's decision on call-related databases. On appeal, the CLECs argued that the only reason that alternatives existed to ILEC databases was because the FCC had previously ordered access to such databases.²⁰⁰ The Court rejected this argument and held that "[a]s it stands, CLECs evidently have adequate access to call-related databases. If subsequent developments alter this situation, affected parties may petition the [FCC] to amend its rule."²⁰¹ To date, no party has filed such a petition.

Because CLECs no longer have access to unbundled switching, CLECs have no unbundled access to call-related databases. BellSouth's legal obligation is expressly limited to providing databases only in connection with switching provided under the FCC's transition plan. To circumvent the binding federal rules, the CLECs rely again on Section 271; claiming BellSouth must include language concerning Section 271 access to call-related databases in its interconnection agreements.²⁰² Because the Authority has no Section 271 authority, and because it is patently unreasonable to assume that the FCC and D.C. Circuit eliminated unbundling requirements for databases only to have such obligations resurrected through Section 271, CompSouth's proposed language must be rejected.

¹⁹⁹ *TRO* at ¶ 551

²⁰⁰ *USTA II* at 50

²⁰¹ *Id*

²⁰² *JPG-1* at 49-50

II. Transition Issues (2, 3, 4, 5, 9, 10, 11, 32)

- A. **Issue 2: TRRO Transition Plan** *What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's TRRO, issued February 4, 2005?*

Relevant Contract Provisions: (1) Switching: PAT-1, Sections 4.2 and 5.4.3; (2) High Capacity Loops: PAT-1 Sections 2.1.4 and 2.8.4; (3) Dedicated Transport: PAT-1, Sections 6.2 and 6.9.1

1. **Summary of Argument**

The overriding disputes between BellSouth and the CLECs involve the FCC's transition plan including establishing contract language that effectuates an orderly transition that is completed by the end date of the transition period and making clear that CLECs cannot pay UNE rates after they have migrated from Section 251 UNEs to other serving arrangements.²⁰³ In addition, the CLECs also improperly seek to include contract language that would allow them to transition from Section 251 UNEs to Section 271 checklist items, any such language must be rejected as explained in connection with Issue 8.

It is clear from the FCC's own language that CLECs should not be allowed to wait until the eleventh hour to work cooperatively with BellSouth to establish an orderly transition. Instead, the FCC stated that its timeframes provide: (1) adequate time to perform "the *tasks* necessary to an orderly transition";²⁰⁴ and (2) "the time necessary to *migrate* to alternative fiber arrangements".²⁰⁵ There can be no realistic debate that the FCC provided a transition period for exactly that purpose, to have an orderly transition.²⁰⁶

²⁰³ In addition to these disputes, BellSouth and the CLECs dispute which wire centers in Tennessee are not impaired pursuant to the FCC's impairment tests. BellSouth addresses which wire centers satisfy the test in its discussion of Issue 5, not Issue 2. BellSouth also discusses CompSouth's erroneous fiber-based collocation definition in its discussion of Issue 4.

²⁰⁴ (TRRO at ¶ 143 (DS1/3 transport), ¶ 196 (DS1/3 loops), ¶ 227 (local switching))

²⁰⁵ (TRRO at ¶ 144 (dark fiber transport), ¶ 198 (dark fiber loops)) Tipton Direct at 5 – 6

²⁰⁶ *Id*

Once CLECs have migrated from UNEs to alternative serving arrangements, the rates, terms, and conditions of such alternatives apply.²⁰⁷ The TRRO specifically states that these rates will apply only while the CLEC is leasing the de-listed element from the ILEC during the relevant transition period.²⁰⁸ The transition rates will thus apply until the earlier of March 10, 2006 (or September 10, 2006 for dark fiber), or the date the de-listed UNEs are converted to the alternative arrangements ordered by the CLEC.²⁰⁹

There is no legal basis for including contract language that would allow CLECs to transition from UNEs to state regulated Section 271 services. The Authority has no authority to dictate the rates, terms, and conditions of BellSouth's Section 271 obligations, and should reject CLECs' attempts to encourage it to issue an illegal order.

2. Local Switching and UNE-P

Relevant Contract Provisions: PAT-1, Sections 4.2 and 5.4.3

In establishing transitional language, the Authority should require CLECs to identify their embedded base via spreadsheets and submit orders as soon as possible to convert or disconnect their embedded base of UNE-P or standalone local switching.²¹⁰ This will give BellSouth time to work with each CLEC to ensure all embedded base elements are identified, negotiate project timelines, issue and process service orders, update billing records, and perform

²⁰⁷ Tipton Rebuttal at 12.

²⁰⁸ See TRRO at ¶¶ 145, 198 and 228

²⁰⁹ *Id*

²¹⁰ Tipton Direct at 7 – 8 BellSouth initially proposed that such orders be issued by October 1, 2005 and December 9 Tipton Direct at 7, 9 As Ms Tipton explained during the hearing, BellSouth is not insisting on these specific dates, BellSouth established these dates by taking the last date of the transition period, then determining how much time it would take to negotiate with CLECs to reach agreement on their embedded base, to reach timelines, and to get orders issued Since October 1, 2005 has now passed, the Authority should order CLECs to submit orders as soon as possible Tr Vol IV, at 19-21 Conceivably, the Authority could issue an order that implements BellSouth's proposed December 9 date, if not, BellSouth repeats its request that the Authority order CLECs to submit orders as soon as possible

all necessary cutovers.²¹¹ If a CLEC fails to submit orders to convert UNE-P lines to alternative arrangements in a timeframe that allows the orders to be completed by March 10, 2006, BellSouth will convert remaining UNE-P lines to the resale equivalent no later than March 11, 2006.²¹² BellSouth is committed to avoiding any disruption to end users. For any remaining stand-alone switch ports, BellSouth will disconnect these arrangements no later than 3/11/06, as there is no other tariff or wholesale alternative for stand-alone switch ports.²¹³

The Authority must also include the transitional rates contained in the FCC's rules.²¹⁴ In doing so, the rules make clear that transitional switching rates would be determined based on the higher of the rate *the CLEC paid* for that element or combinations of elements on June 15, 2004, or the rate the state commission ordered for that element or combination of elements between June 16, 2004 and the effective date of the *TRRO*.²¹⁵ In most, if not all instances, the transitional rate will be the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the transitional additive (\$1 for UNE-P/Local Switching). For UNE-P, this includes those circuits priced at market rates for the FCC's four or more line carve-out established in the *UNE Remand Order* and affirmed in the *TRO*, n. 1376. To the extent that contracts include a market based price for switching for "enterprise" customers served by DS0 level switching that met the FCC's four or more line carve-out, these terms and rates were included in the interconnection agreements and were in effect on June 15, 2004.²¹⁶

The Authority must reject CompSouth's suggestion that TELRIC rates plus \$1 apply to such customers, as the FCC was very clear that for the embedded base of UNE-Ps, the CLECs

²¹¹ *Id*

²¹² *Id*

²¹³ *Id*

²¹⁴ See 47 C.F.R. 51.319(d)(2)(iii)

²¹⁵ Tipton Rebuttal at 6 – 7

²¹⁶ Although BellSouth has the legal right to the transitional additive in addition to the rate in existing interconnection agreements (Tipton Rebuttal at 7-8, 47 C.F.R. § 51.319(d)(2)(iii), BellSouth has elected not to apply the additional \$1 to previously established market rates for switching

would pay either the higher of the rates that were in their contracts as of June 15, 2004, or the rates that the state commissions had established between June 16, 2004 and the effective date of the TRRO, plus \$1.²¹⁷

3. **DS1 and DS3 High Capacity Loops and Dedicated Transport**

Relevant Contract Provisions: PAT-1, Sections 2.1.4 and 6.2

For unimpaired wire centers where the FCC's competitive thresholds are met²¹⁸ or impaired wire centers where the FCC's caps apply,²¹⁹ the Authority should require CLECs to submit spreadsheets by December 9, 2005 or as soon as possible identifying the embedded base and excess DS1 and DS3 loops and transport circuits to be disconnected or converted to other BellSouth services.²²⁰ If a CLEC does not provide notice in a timely manner to accomplish orderly conversions by March 10, 2006, BellSouth will convert any remaining embedded or excess high capacity loops and interoffice transport to the corresponding tariff service offerings.²²¹

4. **Dark Fiber Loops and Dedicated Transport**

Relevant Contract Provisions: PAT-1 Sections 2.8.4 and 6.9.1

Transitional language ordered by the Authority should require CLECs to submit spreadsheets to identify their embedded base dark fiber to be either disconnected or converted to other services by June 10, 2006.²²² If CLECs do not submit orders in a timely manner so that conversions can be completed by September 11, 2006, BellSouth will convert any remaining

²¹⁷ *Id*

²¹⁸ BellSouth identifies and discusses the wire centers that satisfy the FCC's competitive thresholds in its discussion of Issue 4

²¹⁹ BellSouth and other active parties have agreed that the DS1 transport cap applies to routes for which there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport

²²⁰ Tipton Direct at 9 – 11

²²¹ *Id* Again, BellSouth is committed to avoiding disruption to end users

²²² Tipton Direct at 9 – 12

dark fiber loops or embedded base dark fiber transport to corresponding tariff service offerings.²²³

5. Transition Rates, Term, and Conditions

In addition to including contractual language that requires CLECs to identify their embedded base of customers and that requires timely and orderly steps to effectuate the transition from UNEs to alternative services, the Authority should also require a number of additional steps. The Authority has already made clear in its “No New Adds” order that the transition period applies only to the embedded base of de-listed UNE arrangements and does not permit CLECs to add new local switching, UNE-Ps, high capacity loops, or high capacity transport in unimpaired wire centers or in excess of the caps.²²⁴ To the extent that a CLEC has added such services after March 11, 2005, they must be trued up to the appropriate rate as of March 11, 2005 following the execution of an amended interconnection agreement. Also, the transition process must begin and end within the transition period and may not be extended to some later date.²²⁵

As explained above in connection with switching, the transition rate is the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the FCC’s prescribed transitional additive for that particular element.²²⁶ For UNE switching, the additive is \$1.00.²²⁷ For UNE high capacity loops and transport, the additive is 15% of the rate paid (*i.e.*, a rate equal to 115% of the rate paid as of June 15, 2004).²²⁸ Transition period pricing applies for each de-

²²³ *Id* BellSouth is committed to avoiding disruption to end users. Dark fiber by its nature is not being used to serve end users.

²²⁴ Tipton Direct at 8.

²²⁵ Tipton Rebuttal at 14.

²²⁶ Tipton Rebuttal at 9.

²²⁷ *Id*.

²²⁸ *Id* at 8.

listed UNE retroactively to March 11, 2005.²²⁹ Facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon amendment of the interconnection agreements as part of the applicable change of law process.²³⁰ The transition rates will not go into effect without a contract amendment but once the agreement is amended, the transition rate must be trued-up to the March 11, 2005 transition period start date.²³¹ The transition rates apply only while the CLEC is leasing the de-listed element from BellSouth during the transition period.²³² Once the de-listed UNE is converted to an alternative service, the CLEC will be billed the applicable rates for that alternative service going forward.²³³

B. Issue 3: Modification and Implementation of Interconnection Agreement

Language: *(a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations? (b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?*

The FCC directed in its *TRRO* that carriers “implement changes to their interconnection agreements consistent with [the FCC’s] conclusions [in the *TRRO*].”²³⁴ Carriers’ must, accordingly, execute amendments to their interconnection agreements to remove the availability of de-listed UNEs. As of July 19, 2005, BellSouth had executed amendments to 98 of its interconnection agreements in Tennessee to implement the changes in law that are the subject of this proceeding.²³⁵ The Authority should order all CLECs that have not yet executed a *TRO*- and *TRRO*-compliant amendment to their interconnection agreement to execute an amendment

²²⁹ *Id.* at 8-9

²³⁰ *TRRO* n 408, 524, 630

²³¹ *Id.*

²³² Tipton Rebuttal at 12

²³³ *Id.*

²³⁴ *TRRO* at ¶ 233

²³⁵ Blake Direct at 6

with Authority-approved contract language promptly following issuance of the Authority's Order approving such language.

For interconnection agreements that are currently the subject of arbitrations, the Authority should address change-of-law issues in this proceeding and apply its conclusions in those arbitrations. Proceeding in that manner is most efficient in that the Authority will have to address a given issue only once. The same rationale applies to agreements that are being negotiated, but for which no arbitration has yet been filed. The Authority should, therefore, also direct that parties incorporate language approved in this proceeding into their new interconnection agreements.

In their federal appeal of the TRA's No New Adds Order (but not in testimony in this docket), NuVox and Xspedius contend that they are special and that as a result of their "abeyance agreement" with BellSouth, they, and only they, should not be required to amend their current interconnection agreements with BellSouth to incorporate the *TRRO*.²³⁶ To the contrary, the so-called "abeyance agreement" between BellSouth and these CLECs does *not* mean that these CLECs do not have to implement the *TRRO* until they execute a new interconnection agreement with BellSouth.

The so-called abeyance agreement is set forth in a Joint Motion BellSouth and these two CLECs filed July 15, 2004, in Docket No. 04-00046 – the docket wherein what will be a new interconnection agreement between the parties is being arbitrated.²³⁷ There is no dispute that the parties agreed to hold the arbitration of their new interconnection agreement in abeyance for 90 days in light of the uncertainty of the FCC's unbundling rules created by the D.C. Circuit Court

²³⁶ The TRA has properly moved to dismiss the CLECs' federal action. See TRA's Defendant's Motion to Dismiss Complaint, U S District Court of the Middle District of Tennessee, Case No 05-CV 3-05-0742 at 10 (noting that "[t]he alleged 'abeyance agreement' was brought before the Authority" and that the TRA's actions regarding these CLECs are not appropriate for federal review at this time.

²³⁷ *Id*

of Appeals' *USTA II* decision.²³⁸ NuVox and Xspedius now claim that BellSouth agreed in the July 2004 abeyance agreement to forego its right to exercise the change-of-law clause in the parties' current interconnection agreement, pursuant to which the two CLECs continue to and will operate until the parties conclude the arbitration of and execute a new agreement, to implement the *TRO* and *TRRO*.²³⁹ The sole basis for this claim is the sentence in the abeyance agreement that states that the parties "agreed to avoid a separate/second arbitration process of negotiating/arbitrating change-of-law amendments to the current [i]nterconnection [a]greement to address *USTA II* and its progeny."²⁴⁰

NuVox and Xspedius' claim that it does not have to execute a *TRRO*-compliant amendment to its interconnection agreement and is not required to implement the *TRRO* until some unspecified time in the future when it executes a brand new interconnection agreement is without merit. The abeyance agreement does not mention the *TRRO*. Indeed, the abeyance agreement *pre-dated* the *TRRO* by approximately eight months. The scope of the abeyance agreement was limited by its terms to changes resulting from *USTA II*. It is not reasonable to believe that eight months before the release of the *TRRO*, and before any party knew what rules would come out of the *TRRO*, BellSouth voluntarily waived its right to amend its interconnection agreement with NuVox and Xspedius to incorporate that *Order*.

Other State commissions have rejected the strained interpretation of the abeyance agreement that NuVox and Xspedius advocate. The South Carolina Public Service Commission considered an identical agreement between NuVox and BellSouth. It held:

The abeyance agreement simply provides that the parties will continue to operate under their current Commission-approved interconnection agreements

²³⁸ *Id*

²³⁹ *See Complaint for Declaratory Relief*, United States District Court for the Middle District of Tennessee, Case No. 05-CV-3-05-0742, 5-6

²⁴⁰ *Id* at 6

until such time as they move into a new agreement either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement. The agreement says nothing of changes of law that might be mandated by the FCC in the TRRO. In other words, adopting the joint petitioners argument would require this Commission to conclude that the scope of the abeyance agreement was so wide that even though the TRRO proceeding is never mentioned in the agreement, BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the TRRO and the current agreements eight months prior to those changes ever being issued. In effect, the joint petitioners argue that BellSouth essentially gave up its right to implement those new rules for the current agreement, even before any party knew what those rules would contain. We reject this argument because it impermissibly leads to unreasonable results.²⁴¹

The Authority should likewise reject the tortured interpretation of the abeyance agreement that NuVox and Xspedius are advocating. Their argument violates the express terms of the abeyance agreement and is plainly unreasonable. In addition, adopting their position would allow two CLECs, and two CLECs only, to continue to order and pay TELRIC rates for de-listed UNEs until they execute a new interconnection agreement. That would not only permit them to disregard the FCC's express deadlines, but also would unfairly permit the two CLECs to have an advantage that other CLECs do not get. For all of these reasons, the Authority should reject NuVox and Xspedius' abeyance agreement argument and order that they, like all other CLECs, must abide by the Authority's No New Adds order and amend their interconnection agreements to be compliant with the *TRO* and *TRRO*.

²⁴¹ Order of South Carolina Public Service Commission in Docket No. 2004-316-C (August 1, 2005), at 9. See also Order of North Carolina Utilities Commission Docket P-55 Sub 1550, dated April 25, 2005, at 12-13.

- C. **Issue 4: High Capacity Loops and Dedicated Transport:** *What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined. (i) business line; (ii) fiber-based collocation; (iii) building; (iv) route; (v) Is a CLEC entitled to obtain DS3 transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers? (vi) Is a CLEC entitled to obtain dark fiber transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers?*

Relevant Contract Provisions: PAT-1 Sections 1.8, 2.1.4, 2.3, 2.8.4, 6.2-6.7. 6.9; PAT 2 Sections 1.8, 2.1.4, 2.3.6, 2.3.8, 2.3.12, 5.2-5.5, 5.9

To implement BellSouth's Section 251 unbundling obligations, BellSouth's contract language properly cites to the relevant federal rules, and incorporates the FCC's impairment thresholds.²⁴² BellSouth recognizes its Section 251 obligation to provide unbundled DS1 loops and transport, and unbundled DS3 loops and transport, available except in the instances in which the FCC's impairment tests are satisfied.²⁴³ BellSouth has no obligation to provide unbundled access to entrance facilities, and the CLECs do not contend otherwise.²⁴⁴ BellSouth has also proposed language that captures the federal requirements concerning dark fiber loops and dark fiber transport.²⁴⁵ Concerning routes, no party disputes the federal rules provide the applicable definition. To the extent a CLEC orders transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers, and *connects* these links together in another Tier 3 wire center, the CLEC has created a route between unimpaired wire centers which should be disallowed as gaming.²⁴⁶ Finally, with respect to EELs, the FCC's impairment tests must be applied to the individual elements comprising an EEL.²⁴⁷

²⁴² Tipton Direct at 14 – 24 The parties do not dispute that route is defined in the federal rules

²⁴³ Tipton Direct at 19 – 23

²⁴⁴ Tipton Direct at 24

²⁴⁵ *Id.* at 20, 23

²⁴⁶ *Tr* at 768, *TRRO* at ¶ 106

²⁴⁷ Tipton Direct at 24.

The essence of the parties' dispute concerning high capacity loops and transport is not implementing BellSouth's Section 251 obligations; rather, it is effectuating the FCC's impairment tests in a manner that is faithful to the *TRRO*. In terms of the actual definitions that should be included in interconnection agreements, the federal rules should be incorporated.²⁴⁸ To the extent a term is not defined, such as "building", a definition is not required. For example, BellSouth suggests the Authority simply define building based on a reasonable person standard.²⁴⁹ Alternatively, if the Authority adopts any definition of building, it should elect to use the definition contained in Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.²⁵⁰

The parties' key dispute in reaching agreed upon definitions centers on CompSouth's proposed fiber-based collocator language, which should be rejected by the Authority. Instead of faithfully including the federal rule, set forth at 47 C.F.R. § 51.5, CompSouth has added self-serving limitations and exclusions that are not contained in the rules. The federal rule, in its entirety, states as follows:

Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.

CompSouth's proposed language improperly adds the language below to the federal definition:

For purposes of this definition: (i) carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter

²⁴⁸ *Id*

²⁴⁹ Tipton Rebuttal at 22

²⁵⁰ PAT-5, p 19

into the same, will be treated as affiliates and therefore as one collocator; provided, however, in the case one of the parties to such merger or consolidation arrangement is BellSouth, then the other party's collocation arrangement shall **not** be counted as a Fiber-Based Collocator, (ii) a Comparable Transmission Facility means, at a minimum, the provision of transmission capacity equivalent to fiber-optic cable with a minimum point-to-point symmetrical data capacity exceeding 12 DS3s; (iii) the network of a Fiber-Based Collocator may only be counted once in making a determination of the number of Fiber-Based Collocators, notwithstanding that such single Fiber-Based Collocator leases its facilities to other collocators in a single wire center; provided, however, that a collocating carrier's dark fiber leased from an unaffiliated carrier may only be counted as a separate fiber-optic cable from the unaffiliated carrier's fiber if the collocating carrier obtains this dark fiber on an IRU basis.

CompSouth's proposed language seeks to force BellSouth to count AT&T and SBC as one fiber-based collocator, rather than as separate fiber-based collocators.²⁵¹ This is not a live dispute in Tennessee, because there are no wire centers in which BellSouth currently counts AT&T and SBC separately. CompSouth cannot dispute, however, that the *TRRO* has a precise effective date. The FCC set forth its tests to measure the amount of competition present in a given wire center *at a given time*, and as of the March 10, 2005 effective date of the *TRRO* and even today, AT&T and SBC are **not** affiliated companies. Indeed, state commissions that have been faced with this issue previously have declined to count Verizon and MCI, or and SBC and AT&T, as one entity.²⁵²

The Authority should also reject CompSouth's proposed language about counting the network of fiber-based collocators separately. Although this is also a theoretical issue, rather than a live dispute between the parties, it makes perfect sense that a CLEC purchasing fiber from another CLEC can qualify under the federal definition. As Ms. Tipton explained in her direct

²⁵¹ BellSouth also separately counts ICG and Xspedius, although Xspedius purchased the assets of ICG as of June 30, 2005. This, also, is not a live dispute in Tennessee.

²⁵² See *Rhode Island Order* at 12 – 13, see also Order, p. 11, Case No. U-14447, Michigan Public Service Commission, Sept. 20, 2005 (“[i]n the Commission’s view, the federal rules do not support the Joint CLECs’ position. Contrary to their arguments, the Commission is not free to rewrite the FCC’s rules, to improve upon them, or ignore them when arbitrating interconnection agreement terms”) (“Michigan Order”).

testimony, if one CLEC purchases fiber from another, has terminating fiber equipment, and can use the fiber it purchases to transport traffic in and out of a wire center, it qualifies.²⁵³ CompSouth's proposed definition ignores this reality, and has the potential to lead to gaming. For example, a CLEC or other party could agree to purchase all of the collocation arrangements in a given wire center for some nominal sum, then lease this space back to the previous owners for a paltry amount in exchange for a percentage of the savings the former owners will accrue by paying cost-based UNE rates instead of special access rates.

CompSouth's additional language addressing fiber-based collocation must be rejected as inconsistent with the federal rules and vulnerable to gaming. BellSouth's proposed contract language is fully consistent with the federal rules and should be approved.

- D. Issue 5: Unimpaired Wire Centers:** *(a) Does the Authority have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate? (b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport? (c) What language should be included in agreements to reflect the procedures identified in (b)?*

Relevant Contract Provisions: PAT-1 Sections 2.1.4.5.1, 2.1.4.5.2, 2.1.4.9, 2.1.4.10, 6.2.6.1, 6.2.6.2, 6.2.6.7, 6.2.6.8; PAT-2 Sections 2.1.4.2.1, 2.1.4.2.2, 2.1.4.4, 2.1.4.5, 5.2.2.1, 5.2.2.2, 5.2.2.4, 5.2.2.5

1. State Commission Authority

Pursuant to *USTA II*, the FCC may not delegate impairment decisions to state commission.²⁵⁴ State commissions, however, are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO*.²⁵⁵ As a practical matter, therefore, the Authority must resolve the parties' disputes concerning the wire centers in Tennessee that meet the FCC's impairment tests

²⁵³ Tipton Direct at 33.

²⁵⁴ *USTA II* at 574

²⁵⁵ *TRRO* at ¶ 234

so that all parties have a common understanding of the wire centers from which CLECs must transition UNEs to alternative arrangements.²⁵⁶

2. Tennessee Wire Centers that Currently Satisfy the FCC’s Impairment Tests

Listed below, in tabular format, are the wire centers in Tennessee that currently satisfy the FCC’s impairment tests²⁵⁷:

Wire Center	Total Business Lines	Number of Fiber Based Collocators if 3 or Greater	Transport	
			Tier 1	Tier 2
CHTGTNBR	24,314	-		X
CHTGTNNS	23,166	3		X
KNVLTNMA	37,284	3		X
MMPHTNBA	34,364	-		X
MMPHTNEL	30,973	3		X
MMPHTNGT	26,311	-		X
MMPHTNMA	23,520	6	X	
MMPHTNMT	10,289	3		X
MMPHTNOA	36,686	2		X
NSVLTNBW	28,974	-		X
NSVLTNDO	24,914	-		X
NSVLTNMT	78,781	3	X	
NSVLTNST	24,911	-		X
NSVLTNUN	19,987	3		X

BellSouth seeks relief in a limited number of wire centers, 14 out of a statewide total of 195. BellSouth requests that the Authority order CLECs to transition existing Section 251 loops and transport (as applicable) in the wire centers listed above to alternative serving arrangements. BellSouth further requests that the Authority make clear that CLECs have no basis to “self-certify” to obtain Section 251 loops and transport in the future in the wire centers above (as applicable).

²⁵⁶ Tipton Direct at 26 – 27

²⁵⁷ Tipton Direct at 35 – 36

In confirming that the wire centers identified above satisfy the FCC's impairment test, the only live dispute with CompSouth concerns the application of the FCC's federal rule defining business lines.²⁵⁸

As a preliminary matter, the Authority should reject out of hand CompSouth's unfounded claims that the FCC expected a different number of wire centers to satisfy the impairment thresholds it established in the *TRRO*. BellSouth's response to the TRA's Data Requests, Item No. 3, included all of its correspondence to the FCC, which is also available as a matter of public record. Notably, the FCC *specifically asked BellSouth to provide it with update wire center designations following the issuance of the TRRO*. The FCC's request demonstrates clearly that the FCC knew precisely what it was doing when it established its business line rule. Any attempt by CompSouth to compare the data Bellsouth provided *before* the *TRRO* was issued to data it provided *after the TRRO was issued, at the FCC's express request*, and claim that the results are different than what the FCC expects is flatly wrong.²⁵⁹

Concerning business lines, there are two primary areas of dispute. The first is BellSouth's treatment of UNE loops, the second concerns BellSouth's treatment of high capacity loops. In both areas, BellSouth properly implemented the applicable federal rule.

With respect to including UNE loops, the text of the *TRRO* clearly requires BellSouth to include business UNE-P.²⁶⁰ BellSouth did so, and the CLECs have not suggested BellSouth should have included residential UNE-P. The CLECs take issue with BellSouth including all other UNE loops. The federal rule requires the

number of business lines in a wire center [t]o equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that

²⁵⁸ See 47 C F R § 51.5

²⁵⁹ Moreover, the CLECs have raised their concerns with the FCC. See Hearing Exhibit 25. The FCC, and not the Authority, should clarify its rule if it deems such a clarification to be necessary.

²⁶⁰ *TRRO* at ¶ 105

wire center, including UNE loops provisioned in combination with other unbundled elements.²⁶¹

The FCC intentionally required all UNE loops (excepting residential UNE-P) to be included, because it gauges “the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs.”²⁶² The CLECs, however, may imply that because BellSouth included *all* UNE loops, that it has wrongly included some UNE loops that serve residential customers. Any such implication is flatly contradicted by Mr. Gillan’s deposition testimony. Specifically, BellSouth questioned Mr. Gillan about his views of DSO loops, which would be the single loop type used to serve residential customers. Mr. Gillan conceded that he did not think it was worth “correcting” BellSouth’s business line count to exclude residential DSO loops because “it’s such a small number ... trying to go into do it correctly wouldn’t be worth it. ‘Cause you just – you don’t know whether or not those lines are used to provide switched business service.”²⁶³ Thus, the CLECs cannot legitimately express some disagreement to the Authority with BellSouth’s inclusion of all UNE loops – they conceded, even if they have a philosophical disagreement, it is not worth “correcting” the business line data county to exclude these lines and that Bellsouth doesn’t know if such lines are business lines in any event. More importantly, if the Authority were to disregard completely some portion, estimate, or percentage of UNE loops, it would ignore the “opportunity” present in a particular wire center. The FCC’s language is clear and it is logical given the FCC’s purpose in evaluating the opportunity in a wire center.

The Authority should also reject the CLECs’ attempts to improperly lower the business line count that BellSouth has provided. Mr. Gillan’s suggestion that the Authority must

²⁶¹ 47 C F R § 51.5

²⁶² TRO at ¶ 105

²⁶³ Gillan Deposition at 43

undertake some calculation or estimate to capture "switched" UNE loops is nonsense. Mr. Gillan concedes there is no source that would provide data concerning which UNE loops are switched as compared to loops that are not switched.²⁶⁴ Indeed, Mr. Gillan conceded that even his own members could not provide such data:

DIRECTOR TATE Q. Okay. And so the difference in the actual and the potential capacity you spoke about a few minutes ago, like maybe you just wouldn't know that someone was utilizing all of the capacity?

MR. GILLAN A. Yes, for the CLEC. Here's – if BellSouth is serving the customer, it gives them this pipe and then it knows how many lines the customer is actually purchasing on the pipe. If for that same customer the CLEC wins the customer and then the CLEC buys the pipe, well, now BellSouth has given the pipe to the CLEC and so BellSouth's billing records don't tell it how many lines the CLEC is selling the customer. Now, I don't think it makes any sense that the business line count changes based on whether the incumbent serves the customer or the CLEC serves the customer. What changes is how easy it is for BellSouth to calculate the number.

* * * *

DIRECTOR TATE Q. And it's just impossible, impracticable for you-all to be able to provide an exact number or for the CLECs?

MR. GILLAN A. It becomes – it becomes impractical. We're trying to do it with just the CompSouth members and then partially it was all of their billing systems look different. Some of them don't collect the information at all in this form. Even if I had gotten the information – I never would have gotten the information from all of them. I would have gotten it from one or two of them, and then I would have been accused of whether those were representative. So I just don't think it's – at first that's how I thought – my thinking was going down the line you were thinking.

* * * *

DIRECTOR TATE Q. But you-all would – the CLECs would know that exact[ly] because how they're billing their customers is based on those lines?

MR. GILLAN A. Not always. See, here's the problem. If I'm – some CLECs might be selling the customer service that is just six business lines and all data and they may call that Advantage, you know, whatever. And they bill the customer for Advantage, and then they don't have in their billings system how

²⁶⁴ Gillan Deposition, Hearing Exhibit 4 at 44

that product was split between voice and data. That was the problem I was running into. Unless the CLEC product and the CLEC billing systems were designed to track business lines, which they weren't, there was no way to collect the data from many of them, and then it was almost impossible to collect data from CLEC A that you knew was comparable to what you were getting from CLEC B, etc.²⁶⁵

Moreover, his testimony flatly contradicts the FCC's intent to capture, with its business line test, an accurate measurement of the revenue *opportunity* in a wire center.²⁶⁶ Indeed, considering the FCC was very clear that it wished to avoid a "complex" test, or a test that would be subject to "significant latitude,"²⁶⁷ it is difficult to imagine any useful purpose – other than obtaining UNEs when no impairment exists – served by Mr. Gillan's complex proposed estimates and assumptions.²⁶⁸

To limit the number of lines as Mr. Gillan suggests is not only contrary to the FCC's intent to capture *opportunity*, it flies squarely against the revised impairment standard of the *TRRO* which considers, in part, whether requesting carriers can compete without access to particular network elements.²⁶⁹ Likewise, the revised impairment standard requires consideration of *all* the revenue opportunity that a competitor can reasonably expect to gain over facilities it uses, from all possible sources.²⁷⁰ Thus, the business line test is designed as a "proxy" for gauging the competitive opportunities, and if the Authority consciously excludes some portion of UNE loops under the misguided notion that because they are not "switched"

²⁶⁵ TRA Docket No 04-00381, Transcript of proceedings, Wednesday, September 14, 2005, Vol. IV, pp 124-129.

²⁶⁶ *TRRO* at ¶ 104

²⁶⁷ *TRRO*, ¶ 99

²⁶⁸ Indeed, Director Kyle asked Mr. Gillan "Where in here does it tell me I can assume? the best possible this is how it should be compared scenario?" (*Tr* Vol IV, p 129-130) Mr Gillan conceded that "the word 'assume' doesn't appear anywhere; however, there's no way for us to comply with the FCC rule without making assumptions." *Id* BellSouth disagrees that assumptions are required. BellSouth did not make any assumptions – BellSouth followed the FCC's rule by counting the maximum potential in high capacity facilities, thereby effectuating the instruction in the FCC rule that "a DS1 line corresponds to 24 64 KBPS-equivalents, and therefore to 24 'business lines.'" 47 C F R 51.5

²⁶⁹ *TRRO* at ¶ 22

²⁷⁰ *Id* at 24.

they should not qualify, it ignores completely the competitive opportunity and potential present in the UNE loops. A CLEC has the choice to provide all voice (or switched) services over a loop, or it can opt to provide a mixture of voice and data services. That does not mean that a CLEC needs continued access to UNEs, simply because it serves customers using a bundled offering. Instead, excluding an estimated number of UNEs because some unknown number of CLECs provide data would only serve to improperly evaluate impairment with reference to a particular CLEC's business strategy, which would be unlawful.²⁷¹

Although Mr. Gillan did not seek to reduce business lines by a Centrex equivalency multiplier to the extent that any party makes such a suggestion it would be misplaced. Such a proposal is inconsistent with the FCC's ARMIS instructions, which count each Centrex line as one business line.²⁷² It is also consistent with a September 20, 2005 decision of the Michigan Public Service Commission, in which, that commission ruled

the *TRRO* requires that the line count include each Centrex line as one line, without a factor to reduce the number to one ninth. There is no provision in those rules or the *TRRO* that would permit the reduction by the Centrex equivalency factor as proposed by the CLECs. If the parties believe that such an equivalency factor is appropriate for use in the impairment analysis, they must prevail on that argument before the FCC.²⁷³

The federal rule also very clearly requires ISDN and other digital access lines, whether BellSouth's lines or CLEC UNE lines, to be counted at their full system capacity; that is, each 64 kbps-equivalent is to be counted as one line.²⁷⁴ The FCC rule plainly states that "a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'"²⁷⁵ The FCC has

²⁷¹ *TRRO*, ¶ 25

²⁷² Tipton Rebuttal at 27

²⁷³ *In re Commission's own Motion to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon*, 2005 Mich PSC LEXIS 310, Order at * 13

²⁷⁴ 47 C F R § 51.5

²⁷⁵ *Id.*

made clear its "test requires ILECs to count business lines on a voice grade equivalent basis. In other words, a DS1 loop counts as 24 business lines, not one."²⁷⁶

During the hearing, BellSouth's witness Ms. Tipton provided a clear explanation of BellSouth's careful application of the FCC's instruction on how to count business lines.²⁷⁷ For their part, the CLECs' witness Mr. Gillan, urged that the counting process laid out by the FCC and followed by BellSouth was not good enough and that the TRA should instead engage in a process of estimating based on certain assumptions rather than simply counting the items outlined in the FCC's rule, stating,

MR. GILLAN: Now, BellSouth addressed uncertainty by just counting – any pipe they sold a CLEC just count it all the way to the top, and we think it's better to estimate say, look, if on average BellSouth has got six business lines per digital pipe, then it's reasonable to expect that on average CLECs have six business lines per digital pipe, and that's how we went about calculating it, because BellSouth only has the billing records for the pipes it's selling.

DIRECTOR TATE: Q. And it's just impossible, impracticable for you-all to be able to provide an exact number or for the CLECs?

MR. GILLAN: A. It becomes – it becomes impractical. We're trying to do it with just the CompSouth members and then partially it was all of their billing systems look different. Some of them don't collect the information at all in this form. Even if I had gotten the information – I never would have gotten the information from all of them. I would gotten it from one or two of them, and then I would have been accused of whether those were representative. So I just don't think it's – at first that's how I thought – my thinking was going down the line you were thinking. At first I thought, well, we'll go get the data, but then it becomes a question of, Well, why would they believe our data? Why would they believe that we gave them accurate data? We didn't get a complete sample. We didn't get a random sample. You know, we have all these disputes about whether our data collection was reasonable while at the very same time they were filing in the proceeding that number for their – for their customer base, and they're still bigger than all of us, so it seemed me it's there, it's in the record. It's their data so there can't be a question about it being unreliable.

All that's left is, you know, it's an assumption that you have to make.²⁷⁸

²⁷⁶ See Sept. 9, 2005, Br for the FCC Respondents, United States Court of Appeals, D C Cir No. 05-1095

²⁷⁷ Tr Vol II, p 175-76

²⁷⁸ Tr Vol IV at 126-127

Following their colloquy, Director Kyle asked the question that resolves this entire issue, “Where does it tell me I can assume?”²⁷⁹ Mr. Gillan's answer goes on for several pages of transcript, but the right answer is that the FCC did not tell the parties to assume; it told them to count the lines, and it told them to count voice grade equivalents “at their full system capacity.”²⁸⁰

CompSouth also implied at the hearing that BellSouth's business line results were inconsistent with BellSouth's financial reporting.²⁸¹ BellSouth has shown this is wrong in its responses to the TRA's Data Requests, filed on October 14, 2005. BellSouth has shown that its financial reporting and line count data are consistent. Likewise, CompSouth's post-hearing attempt to inject some uncertainty concerning BellSouth's Form 477 reporting made to the FCC cannot pass muster. BellSouth's Form 477 Report UNE loop count data as of December 2005 fully matches the stand-alone loop counts presented in this case. BellSouth's Form 477 input did not include EELs (Enhanced Extended Links”). EELs are not explicitly required to be reported in the FCC Form 477 data and BellSouth has not historically included EELs in its Form 477 reporting.²⁸² BellSouth's business line data fully comports with the FCC's directives and with other reports filed with the FCC.²⁸³

²⁷⁹ *Tr* Vol IV at 129

²⁸⁰ 47 C F R § 51.5

²⁸¹ See CompSouth Hrg. Exhibit 18

²⁸² BellSouth is in the process of preparing Form 477 reports that will include EELs data and will happily furnish this information to the Authority. In the meantime, BellSouth files today an excerpt from its Supplemental Response to CompSouth's First Request for Production of Documents produced in Florida that reconciles BellSouth's Form 477 Report UNE loop data as of December 31, 2004 with BellSouth's 2004 UNE loop count data provided in discovery so that the record is complete on this issue that CompSouth conveniently elected to raise after the hearing.

²⁸³ Tipton Direct at 29. In other states, although not in the evidentiary record in Tennessee, CompSouth recently launched an attack against BellSouth's business line counts by suggesting the total numbers did not match numbers reported to the FCC on BellSouth's Form 477. To the extent that CompSouth seeks to improperly introduce such post-hearing evidence here, BellSouth objects, and further states that the loop figures it supplied to the FCC fully match the stand-alone UNE loop counts presented in this case. BellSouth's Form 477 input did not

3. **Identifying Wire Centers in the Future that Satisfy the FCC's Impairment Tests**

To the extent wire centers are later found to meet the FCC's no impairment criteria, BellSouth will notify CLECs of these new wire centers via a Carrier Notification Letter. The non-impairment designation will become effective ten business days after posting the Carrier Notification Letter. Beginning on the effective date, BellSouth would no longer be obligated to offer high capacity loops and dedicated transport as UNEs in such wire centers, except pursuant to the self-certification process. This means that if a CLEC self certifies, BellSouth will process the order, subject to its right to invoke the dispute resolution process if BellSouth believes the self certification is invalid. High capacity loop and transport UNEs that were in service when the subsequent wire center determination was made will remain available as UNEs for 90 days after the effective date of the non-impairment designation. This 90 day period is referred to as the "subsequent transition period." No later than 40 days from effective date of the non-impairment designation, affected CLECs must submit spreadsheets identifying their embedded base UNEs to be converted to alternative BellSouth services or to be disconnected. From that date, BellSouth will negotiate a project conversion timeline that will ensure completion of the transition activities by the end of the 90-day subsequent transition period. BellSouth's future wire center identification process has been agreed to with a number of CLECs, and the Authority should adopt it here.

CompSouth has proposed a different means for identifying future wire centers that would resolve any disputes relating to BellSouth's subsequent wire center identification within ninety days after BellSouth's initial filing.²⁸⁴ BellSouth has no conceptual objection to the Authority

include EELs. EELs, also known as enhanced extended *links* are not explicitly required to be reported in the FCC Form 477 data, and BellSouth has not historically included EELs in its Form 477 reporting

²⁸⁴ Gillan Direct at 32 – 33

resolving future disputes, as shown on BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5; BellSouth, however, is unwilling to agree to a process that limits its right to designate future wire centers on an annual basis. Nothing in the federal rules supports this limitation. Moreover, CompSouth's proposed process improperly inserts a number of qualifications to the data that it seeks from BellSouth, which impose CompSouth's erroneous views on the business line definition into the process. It bears repeating that BellSouth has been successful at resolving this on a commercial basis, an option the Authority could elect here. If the Authority establishes any future process, it must reject CompSouth's annual filing and data limitations, as reflected on BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.

- E. **Issue 9: Conditions Applicable to the Embedded Base** *What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?*

Relevant Contract Provisions: BellSouth does not propose specific language on this issue, other than the transition language identified under Issue 2. See BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.

The resolution of this issue is implicit in the TRA's Order on "No New Adds".²⁸⁵ BellSouth should *not* be required to accept or process orders adding new de-listed UNEs. The TRA's Order is clear:

Effective May 16, 2005, BellSouth is no longer required to provide New Adds and may reject any and all new orders for the de-listed UNEs, ***including new orders*** to serve the CLECs' embedded base of customers.²⁸⁶

²⁸⁵ This issue has also been litigated in federal court for local circuit switching. On April 5, 2005, the United States District Court for the Northern District of Georgia ruled that

[u]nder the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 months and at higher rates than they were paying previously. The FCC made plain that these transition plans applied only to the embedded base and that competitors were 'not permit[ed]' to place new orders.
Order in *BellSouth v. MCI Metro*, Case No. 1:05-CV-0674-CC, at 4.

²⁸⁶ See *Order Terminating Alternative Relief Granted During April 11, 2005 Deliberations*, in Docket No. 04-00381, entered July 25, 2005, at p. 4.

The TRA found that BellSouth could reject *new orders* for de-listed UNEs to serve the CLECs' embedded base. The TRA affirmed its ruling in addressing a subsequent request to revisit this issued filed by Cinergy. Nonetheless, CompSouth's witness, Mr. Gillan, noting he was "aware generally they [the TRA] had ruled on that question," acknowledged that CompSouth's proposed language would in fact permit existing customers to add new lines at new locations, and agreed to abide by the Authority's prior rulings.²⁸⁷ This testimony should render this issue moot.

Moreover, this issue has already been litigated in federal court for local circuit switching. On April 5, 2005, the United States District Court for the Northern District of Georgia ruled that

[u]nder the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 months and at higher rates than they were paying previously. The FCC made plain that these transition plans applied only to the embedded base and that competitors were 'not permit[ed]' to place new orders.²⁸⁸

Both the Authority's "No New Adds" order and the Court's *Order* applies equally to the situation when a CLEC seeks to move a customer's service to a different location, because doing so requires disconnection of the service and the placement of a "new" order for de-listed service. The CLECs argue that a "move" of a de-listed UNE is not a new order. This defies common sense. UNEs are not "moved" to a new location like a telephone set could be. UNEs are disconnected and new ones established to implement a "move."

Changes to existing service do not require a new service order. BellSouth will, accordingly, process orders to modify an existing customer's service by, for example, adding or removing vertical features, during the transition period.²⁸⁹

In order to submit an order for a high-capacity loop or transport UNE, a CLEC must self-certify, based on a reasonably diligent inquiry, that it is entitled to unbundled access to the requested element.²⁹⁰ BellSouth must process the request.²⁹¹ It may only subsequently challenge

²⁸⁷ Cross Examination of Mr. Gillan, *Tr* Vol IV at 62-63

²⁸⁸ *BellSouth v. MCI Metro*, Case No. 1:05-CV-0674-CC, at 4.

²⁸⁹ *Id*

²⁹⁰ *TRRO* at ¶ 234

the validity of such order(s) pursuant to the dispute resolution provision in the parties' interconnection agreement.²⁹²

In accordance with the *TRRO*, BellSouth has been accepting and processing CLEC orders for new high-capacity loops and dedicated transport even in those wire centers and for those routes that BellSouth has identified as areas where CLECs are not impaired pursuant to the competitive thresholds the FCC set forth in the *TRRO*.²⁹³ At the conclusion of this proceeding, however, the Authority should confirm the Tennessee wire centers that satisfy the FCC's impairment tests. Once the Tennessee wire centers are confirmed, CLECs have no basis whatsoever to "self-certify" orders for high capacity loops and dedicated transport in the confirmed wire centers. If BellSouth is to follow the FCC directives, and it will, the Authority must eliminate future disputes by requiring CLECs to abide by its wire center confirmation.

- F. **Issue 10: Transition of De-listed Network Elements To Which No Specified Transition Period Applies:** *What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and (a) what is the proper treatment for such network elements at the end of the transition period; and (b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?*

Relevant Contract Provisions: PAT-1 Section 1.7; PAT-2 Section 1.7

BellSouth has addressed the rates, terms and conditions for elements de-listed by the *TRRO* and which have a designated transition period, including those identified in subpart (b) above, in connection with its discussion of Issue 2. In addition to taking steps to transition away from elements de-listed by the *TRRO*, the FCC removed significant unbundling obligations in the *TRO*, including, entrance facilities, enterprise or DS1 level switching, OCN loops and

²⁹¹ *Id*

²⁹² *Id*

²⁹³ *Id*

transport, fiber to the home, fiber to the curb, fiber sub-loop feeder, line sharing and packet switching.²⁹⁴

Because the FCC eliminated the ILECs' obligation to provide unbundled access to these elements 2 years ago in the *TRO*, CLECs that still have the rates, terms and conditions for these elements in interconnection agreements have reaped the benefits of unlawful unbundling of these elements for far too long.²⁹⁵ As such, with the exception of entrance facilities, which BellSouth will agree to allow CLECs to transition with their embedded base and excess dedicated transport, BellSouth should be authorized in the terms of the interconnection agreement, to disconnect or convert such arrangements upon 30 days written notice absent a CLEC order to disconnect or convert such arrangements.²⁹⁶ BellSouth should also be permitted to impose applicable nonrecurring charges.²⁹⁷ To do otherwise will incent these CLECs to simply refuse to act in order to further delay implementation of the *TRO*. BellSouth's proposed contract language is fully consistent with the *TRO* and should be approved.

- G. **Issue 11: UNEs That Are Not Converted:** *What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms, and conditions that apply in such circumstances?*

Relevant Contract Provisions: PAT-1 Sections 4.2.5, 4.2.6, 5.4.3.5, 5.4.3.6, 2.1.4.11, 2.8.4.7, 6.2.6.9, 6.9.1.9

The *TRRO* makes clear that CLECs must transition their entire embedded base of switching and high capacity loops and transport by March 10, 2006, and not after that date.²⁹⁸

²⁹⁴ Tipton Direct at 39

²⁹⁵ *Id* at 40

²⁹⁶ *Id*

²⁹⁷ *Id*

²⁹⁸ Tipton Direct at 41

To accomplish this, and to minimize disruption to end users, BellSouth needs CLECs to timely provide it with information concerning their plans for these services.

BellSouth is asking CLECs to identify their embedded base UNE-Ps as soon as possible and to submit orders to disconnect or convert the embedded base in a timely manner so as to complete the transition process by March 10, 2006.²⁹⁹ If CLECs fail to submit orders in a timely manner, BellSouth should be permitted to identify all such remaining embedded base UNE-P lines and convert them to the equivalent resold services no later than March 10, 2006, subject to applicable disconnect charges and the full nonrecurring charges in BellSouth's tariffs.³⁰⁰ Absent a commercial agreement for switching, the Authority should allow BellSouth to disconnect any stand alone switching ports which remain in place on March 11, 2006.³⁰¹ To do otherwise will incent CLECs to simply refuse to act in order to delay implementation of the *TRRO* by the FCC's deadline.

For high capacity loops and dedicated transport, BellSouth is requesting CLECs submit spreadsheets by December 9, 2005 or as soon as possible to identify and designate transition plans for their embedded base of these de-listed UNEs.³⁰² If CLECs fail to submit such spreadsheets, BellSouth should be permitted to identify such elements and transition such circuits to corresponding BellSouth tariffed services no later than March 10, 2006, subject to applicable disconnect charges and full nonrecurring charges in BellSouth's tariffs.³⁰³

For dark fiber, BellSouth is requesting that CLECs submit spreadsheets to identify and designate plans for their embedded base dark fiber loops and de-listed dark fiber transport to

²⁹⁹ *Id* at 42

³⁰⁰ *Id*

³⁰¹ *Id*

³⁰² *Id* at 43

³⁰³ *Id*

transition to other BellSouth services by June 10, 2006.³⁰⁴ If a CLEC fails to submit such spreadsheets, BellSouth should be allowed to identify all such remaining embedded dark fiber loops and/or de-listed dark fiber dedicated transport and transition such circuits to the corresponding BellSouth tariffed services no later than September 10, 2006, subject to applicable disconnect charges and full nonrecurring charges set forth in BellSouth's tariffs.³⁰⁵ BellSouth's proposals are reasonable. The CLECs should not be permitted to wait until the "eleventh hour" to implement the FCC ordered transition mechanisms.

H. Issue 32: Binding Nature Of Commission Order: *How should the determinations made in this proceeding be incorporated into existing § 252 interconnection agreements?*

When the Authority issued its February 8, 2005 Order opening this docket, the Authority provided all CLECs with liberal opportunities to intervene throughout the course of the proceedings. Even after many CLECs had intervened early in the year, the Hearing Officer allowed parties additional time, until July 1, 2005 to intervene. Parties filing after July 1, 2005 were also allowed to intervene.³⁰⁶ The Authority should reaffirm that the outcome of this docket will be binding upon both active parties and upon those CLECs that have been provided with notice of this proceeding, but have elected not to actively participate.

It is important that, at the end of this proceeding, the Authority approves specific contractual language that resolves each disputed issue and that such contract language can be promptly executed by the parties, unless otherwise agreed to, so that the FCC's transitional deadlines are met. The Authority has correctly recognized that the FCC's transitional periods for

³⁰⁴ *Id*

³⁰⁵ *Id* at 44

³⁰⁶ See August 22, 2005 Order Granting Petition to Intervene, granting Covad's August 2, 2005, Petition to Intervene

UNE switching and high capacity loops and dedicated transport cannot be extended beyond March 10, 2006.

BellSouth requests that in order to ensure that a smooth transition, the Authority order that promptly following, but in no event more than 45 days of its written order approving contract language, that parties must execute compliant amendments (*i.e.*, those that track the Authority language, unless otherwise mutually agreed to) to their interconnection agreements. The Authority should make clear that if an amendment is not executed within the allotted timeframe, the Authority's approved language will go into effect for all CLECs in the state of Tennessee, regardless of whether an amendment is signed.

III. Service-Specific Issues (13, 15, 16, 29, 31)

A. Issue 13: Performance Plan: *Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?*

Elements that are no longer required to be unbundled pursuant to Section 251(c)(3) should not be subject to a SQM/PMAP/SEEM plan. The SQM/PMAP/SEEM plan was established to ensure that BellSouth would continue to provide nondiscriminatory access to elements required to be unbundled under section 251(c)(3) after BellSouth gained permission to provide in-region interLATA service. If BellSouth fails to meet measurements set forth in the plan, it must pay a monetary penalty to a CLEC and/or to the State. Section 251(c)(3) elements are those elements which the FCC has determined are necessary for CLECs to provide service and without access to the ILEC's network, the CLEC would be impaired in its ability to do so.

When making the determination that an element is no longer "necessary" and that CLECs are not "impaired" without access to an ILEC's UNE, the FCC found that CLECs were able to purchase similar services from other providers. These other providers are not required to perform under a SQM/PMAP/SEEM plan. To continue to impose upon BellSouth a performance measurement, and possible penalty, on competitive, commercial offerings is discriminatory and

anticompetitive. For commercial offerings, the marketplace, not a SQM/PMAP/SEEM plan, becomes BellSouth's penalty plan. If BellSouth fails to meet a CLEC's provisioning needs, such CLEC can avail itself of other providers of the service and BellSouth is penalized because it loses a customer and associated revenues.³⁰⁷

More than 150 CLECs have entered into commercial agreements to purchase BellSouth's DS0 wholesale platform. Those agreements make available to CLECs a service similar to the UNE-P, but at commercial rates, not rates imposed by a regulator. Those CLECs, which include members of CompSouth, are satisfied with the penalties and remedies in the commercial agreement and were willing to forgo any SQM/PMAP/SEEM penalty payments should BellSouth fail to perform in accordance with the parties' agreement.³⁰⁸

The Georgia Commission recently entered an *Order Adopting Hearing Officer's Recommended Order*, dated June 23, 2005, in Docket No. 7892-U, in which it approved a Stipulation Agreement reached between BellSouth and several CLEC parties which included the following provisions:

1. All DS0 wholesale platform circuits provided by BellSouth to a CLEC pursuant to a commercial agreement are to be removed from the SQM Reports; Tier 1 payments; and Tier 2 payments starting with May 2005 data.
2. The removal of DS0 wholesale platform circuits as specified above will occur *region-wide*.
3. All parties to this docket [the Performance Measurements' docket] reserve the right to make any arguments regarding the removal of any items other than the DS0 wholesale platform circuits from SQM/SEEMs in Docket No.

³⁰⁷ Blake Direct, at 10-11.

³⁰⁸ Blake Direct, at 11

19341-U [the Generic Change of Law docket] to the extent specified in the approved issues list.³⁰⁹

This regional Stipulation was endorsed by a number of CLECs, including AT&T, Covad, MCI and DeltaCom, all of whom are CompSouth member. There is no legitimate reason that de-listed UNEs should be a part of a UNE performance measurements and penalty plan. To not remove such de-listed UNEs from the plan is anticompetitive and unfair to BellSouth.

B. Issue 15: Conversion of Special Access Circuits to UNEs: *Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?*

Relevant Contract Provisions: PAT-1, Sections 1.6, 1.13; PAT-2, 1.6, 1.13

BellSouth will convert special access services to UNE pricing, subject to the FCC's service eligibility requirements and limitations on high-cap EELs, once a CLEC's contract has these terms incorporated in its contract.³¹⁰ BellSouth will also convert UNE circuits to special access services. Special access to UNE conversions should be considered termination of any applicable volume and term tariffed discount plan or grandfathered arrangements.³¹¹ The applicable rates for single element conversions in Tennessee should be \$23.42 for single element conversions and \$24.82 for projects consisting of 15 or more loops submitted on a spreadsheet.³¹² The Authority-ordered rate of \$52.73 applies for EEL conversions, until new rates are issued.³¹³ If physical changes to the circuit are required, the activity should not be considered a conversion and the full nonrecurring and installation charges should apply.³¹⁴

³⁰⁹ Blake Direct at 12

³¹⁰ Tipton Direct at 52

³¹¹ *Id.* at 53

³¹² Tipton direct at 53

³¹³ Tipton Direct at 53

³¹⁴ Tipton Direct at 52

Mr. Gillan did not file any direct or rebuttal testimony addressing Issue 15.³¹⁵ Consequently, the Authority should adopt BellSouth's proposed language, rather than CompSouth's. Indeed, only slight variations exist in the contract language.³¹⁶

- C. **Issue 16: Pending Conversion Requests:** *What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?*

Relevant Contract Provisions: Neither BellSouth nor CompSouth propose specific language on this issue. the parties' dispute concerns CLECs' unfounded claims for retroactive conversion rights. See BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.

The contract language contained in a CLEC's interconnection agreement at the time the *TRO* became effective governs the appropriate rates, terms, conditions and effective dates for conversion requests that were pending on the effective date of the *TRO*.³¹⁷ Conversion rights, rates, terms and conditions are not retroactive and become effective once an interconnection agreement is amended.³¹⁸

Mr. Gillan did not file any direct or rebuttal testimony addressing Issue 16.³¹⁹ In his supplemental testimony, Mr. Gillan claimed that conversion language and rights must be retroactive to March 11, 2005, the effective date of the *TRRO*.³²⁰ This testimony is incorrect, and plainly inconsistent with the *TRO* and the *TRRO*.

CompSouth attempts to portray this issue as "vital" to CLECs.³²¹ This portrayal cannot stand and is belied by the actions of the very CLECs that are complaining. BellSouth attempted to implement changes in law, including contract language that would have allowed CLECs to convert from special access services to UNEs following the *TRO*, yet many CLECs have not

³¹⁵ Gillan Deposition, Hearing Exhibit 4 at 77.

³¹⁶ Tipton Rebuttal at 40

³¹⁷ Tipton Direct at 54; Tipton Rebuttal at 41

³¹⁸ Tipton Direct at 54 – 56

³¹⁹ Gillan Deposition, Hearing Exhibit 4 at 77

³²⁰ Gillan Supp at 1 – 2

³²¹ Gillan Supp at 5

agreed to contract language that includes such provisions. It is not surprising that these CLECs elected to wait, given that the *TRO* as a whole eliminated access to UNEs including entrance facilities, enterprise or DS1 level switching, OCN loops and transport, fiber to the home, fiber to the curb, fiber sub-loop feeder, line sharing and packet switching. CLECs that did not execute *TRO* amendments have presumably decided that it was to their benefit to retain these de-listed UNEs in lieu of obtaining conversion rights.³²² In any event, the retroactive true-up that BellSouth seeks as a result of the de-listed elements in the *TRRO* is explicitly contained in that Order and the federal rules.³²³ Retroactive conversion rights were not contemplated in the *TRO*, instead, the FCC made clear that “carriers [were] to establish any necessary timeframes to perform conversions in their interconnection agreements or other contracts.”³²⁴ This is precisely the conclusion the Massachusetts Commission reached when confronted with this issue.³²⁵

D. Issue 29: Enhanced Extended Link (“EEL”) Audits: *What is the appropriate ICA language to implement BellSouth’s EEL audit rights, if any, under the TRO?*

Relevant Contract Provisions: PAT-1, Section 5.3.4.3; PAT-2, Section 4.3.4.3

BellSouth’s proposed language allows it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria, and requires BellSouth to obtain and pay for an independent auditor who will conduct the audit pursuant to American Institute for Certified Public Accountants (“AICPA”) standards.³²⁶ The auditor determines material compliance or non-compliance.³²⁷ If the auditor determines that CLECs are not in compliance, the CLECs are required to true-up any difference in payments, convert noncompliant circuits and

³²² BellSouth and XO have recently resolved the conversions issue and (except as to XO’s 271 commingling theory where the parties continue to disagree) and filed a joint motion to approve an amendment to their interconnection agreement incorporating agreed upon conversion language. See Petition filed 10/27/05 in Docket No. 05-00300.

³²³ *TRRO*, notes 408, 524, 630 and 47 C.F.R. 51.319(a)(4)(iii), 51.319(d)(2)(iii), 51.319(e)(2)(ii)(C).

³²⁴ *TRO* at ¶ 588.

³²⁵ See *Massachusetts Arbitration Order*, p. 135.

³²⁶ Tipton Direct at 58.

³²⁷ *Id.* at 59.

make correct payments on a going-forward basis.³²⁸ Also, CLECs determined by the auditor to have failed to comply with the service eligibility requirements must reimburse the ILEC for the cost of the auditor.³²⁹ BellSouth should not be required to agree to terms that would add delay and expense to audits, such as: a requirement to show cause prior to the commencement of an audit, incorporation of a list of acceptable auditors in interconnection agreements, or a requirement that parties must agree on the auditor.³³⁰ Finally, to the extent that an auditor determines that a CLEC's noncompliance is material in one area, the CLEC would be responsible for the cost of the audit even if each of the other criteria has been met to the auditor's satisfaction.³³¹

In contrast to BellSouth's proposed language, CompSouth's contract language goes well beyond both the FCC's requirements³³² and the Authority's own rulings in the DeltaCom/XO EELs audit case.³³³ The essential dispute between the parties is that CompSouth claims that BellSouth must show cause to the CLEC before it can begin an audit.³³⁴ That same contention was rejected by the Authority in the DeltaCom/XO case. The trouble that can be created by the notion of such a "cause" requirement is apparent from both the XO/DeltaCom EELs case as well as BellSouth's ongoing EELs dispute regarding NuVox. CompSouth's witness Mr. Gillan acknowledged on cross examination that, while he proposed contract language in his testimony, he was unfamiliar with the history of the Tennessee EELs case, saying "I mean, I'm aware they

³²⁸ *Id*

³²⁹ *Id*

³³⁰ *Id* at 60

³³¹ *Id* at 61

³³² Tipton Rebuttal at 42

³³³ *Report and Recommendation of Pre-Hearing Officer*, February 13, 2004, Docket No 02-01203, *Order Approving Report and Recommendation*, September 29, 2004, Docket No 02-01203

³³⁴ Gillan Deposition, Hearing Exhibit 4 at 84

are going on, I just don't know the specifics."³³⁵ Those who do know the specifics, know that litigation over such a "cause" showing can grind any effort to audit to a complete halt.

As Ms. Tipton explained, BellSouth would not audit without cause.³³⁶ Since BellSouth must pay for the audit, inserting "for cause" contractual language is unnecessary. By attempting to require BellSouth to demonstrate cause before auditing, CLECs can delay the actual audit from ever taking place, all the while reaping unlawful UNE rates. (Just as NuVox has done to date in Tennessee.)³³⁷ The Authority's own experience demonstrates that CLECs have ample incentive to litigate threshold issues to delay or avoid such audits.

Despite the shortcomings in CompSouth's language, BellSouth is willing to accept a reasonable middle ground, as reflected in BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.³³⁸ The Authority must keep in mind that CLECs can self-certify to obtain access to EELs. BellSouth's proposed audit language simply strikes the appropriate balance fashioned by the FCC.³³⁹ The CLECs attempt to curtail BellSouth's audit language is simply an effort to frustrate BellSouth's legitimate audit rights, and the Authority should adopt the language reflected on BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.³⁴⁰

³³⁵ *Tr* Vol IV, p 64

³³⁶ *Tr* Vol III, at 239-240

³³⁷ Docket No 04-00133

³³⁸ *Id*

³³⁹ *Tr* Vol III, at 241

³⁴⁰ The Authority is well-versed in the ongoing problems BellSouth has encountered in seeking to audit the records of a single CLEC, NuVox. Despite these problems, Mr. Gillan blithely claimed that BellSouth and CLECs could mutually agree on an auditor before an audit takes place. Gillan Deposition, Hearing Exhibit 4 at 85. Mr. Gillan's claim is not credible, particularly in light of the fact that he was not aware of any specifics of BellSouth's dispute with CompSouth's member company NuVox. *Tr* Vol IV, at 63.

E. **Issue 31: Core Forbearance Order:** *What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?*

Relevant Contract Provisions: BellSouth does not propose specific language on this issue.

The Authority should order that BellSouth resolve this issue on a carrier by carrier basis depending on the specific facts. To be clear, BellSouth is not attempting to avoid implementing the *Core Order* when it is appropriate to do so. BellSouth's specific concern with generic language on this issue is based on the choices available in the *Core Order*, which allow CLECs to elect different rate structures.³⁴¹ Due to these choices, a one-size-fits-all approach is inappropriate.³⁴² In addition, BellSouth has entered into specific carrier settlements implementing the *Core Order*.³⁴³

Notably, CompSouth is not proposing specific language either.³⁴⁴ Thus, the only language before the Authority is the language proposed by ITC^DeltaCom, which suggests that BellSouth's template agreement should include language implementing the *Core Order*. However, as Ms. Tipton explained, parties still must identify their desired rate structure and including standard language would not address all scenarios encountered in the implementation of the *Core Order*.³⁴⁵

³⁴¹ Tipton Direct at 65

³⁴² *Id*

³⁴³ *Id*

³⁴⁴ See Exhibit JPG-1

³⁴⁵ Tipton Rebuttal at 46 – 47

IV. Network Issues (6, 19, 23, 24, 26, 27, 28)

- A. **Issue 6: HDSL Capable Copper Loops:** *Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?*

Relevant Contract Provisions: PAT-1 Section 2.3.6.1; PAT-2 Section 2.3.6.1

This issue, although written broadly, presents two questions that require Authority resolution, both of which relate specifically to BellSouth's UNE HDSL loop product, rather than to HDSL compatible loops generally. First, the Authority should find that for those wire centers in Tennessee that meet the FCC's impairment thresholds for DS1 loops, BellSouth has no obligation to provide CLECs with its UNE HDSL loop product.³⁴⁶ Second, the Authority should confirm that BellSouth can and should count each deployed UNE HDSL loop as 24 voice grade equivalent lines as directed by the FCC.

Concerning unbundling relief, BellSouth's position that CLECs are not entitled to order UNE HDSL loops in wire centers that satisfy the FCC's thresholds for DS1 loop relief is explicitly supported by the FCC's definition of a DS1 loop. The FCC defined a DS1 loop as including "2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, *such as 2-wire and 4-wire HDSL Compatible Loops.*"³⁴⁷ The federal rule is incorporated into BellSouth's proposed interconnection agreement language, which is as follows:

For purposes of this Agreement, including the transition of DS1 and DS3 Loops described in Section 2.1.4 above, DS1 Loops include 2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, such as 2-wire and 4-wire HDSL Compatible Loops.

³⁴⁶ As previously explained, BellSouth is not asserting that there are currently any such wire centers in Tennessee. However, BellSouth requests that the Authority resolve issue 6 because, as all parties have recognized, the status of wire centers may change, and in the future, certain wire centers in Tennessee may satisfy the FCC's impairment thresholds for loops.

³⁴⁷ 47 C.F.R. § 51.319(a)(4), Fogle Rebuttal at 4 (emphasis supplied)

BellSouth's language simply and appropriately implements the applicable federal rules, which, by their terms, extend unbundling relief to UNE HDSL loops in the same wire centers in which BellSouth is not obligated to provide CLECs with DS1 loops.

In attempting to circumvent the application of the federal rules, the CLEC witnesses ignore the FCC's definition of a DS1 loop, and cite to FCC language addressing HDSL capable loops generally, rather than to the clear and unambiguous language contained in the rules.³⁴⁸ The CLECs' contentions are misplaced, because, by defining DS1 loops as including a 2-wire and 4-wire HDSL loops, the FCC expressly removed any obligation to provide these loops in unimpaired wire centers. More importantly, however, the CLECs cannot refute the reality that there has been very little CLEC interest in BellSouth's UNE HDSL product at all, as only 426 UNE HDSL loops were in service to *all* CLECs in Tennessee as of June 2005.³⁴⁹

The second question posed by this issue relates to how UNE HDSL loops should be calculated in determinations of subsequent wire centers that satisfy the FCC's impairment thresholds. UNE HDSL loops can and should be counted as 24 business lines. In the *TRO* the FCC explained:

We note throughout the record in this proceeding parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. ***Carriers frequently use a form of DSL service, i.e., High-bit rate DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers.*** We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps.³⁵⁰

³⁴⁸ Gillan Direct at 27

³⁴⁹ Fogle Rebuttal at 5

³⁵⁰ *TRO*, n 634 (emphasis supplied)

The FCC has also made clear that, for the purposes of calculating business lines, “a DS1 line corresponds to 24 kbps-equivalents, and therefore to 24 ‘business lines.’”³⁵¹ Since the FCC has declared that a DS1 loop and a T1 are equivalent in speed and capacity, and since the FCC declared that UNE HDSL loops are used to deliver T1 services, it is obvious that BellSouth’s UNE HDSL loops must be counted, for the purpose of determining business lines in an office, on a 64 kbps equivalent basis, or as 24 business lines.³⁵² BellSouth’s proposed contract language is fully consistent with the FCC’s decisions and should be approved.

B. Issue 19: Line Splitting: *What is the appropriate ICA language to implement BellSouth’s obligations with regard to line splitting?*

Relevant Contract Provisions: PAT-1 Section 3; PAT-2 Section 3

No CLEC witness provided any testimony concerning line splitting, which occurs when one CLEC provides narrowband voice service over the low frequency portion of a loop and a second CLEC provides xDSL service over the high frequency portion of that same loop and provides its own splitter.³⁵³ Thus, although Mr. Gillan sponsored contract language concerning line splitting, the Authority can and should disregard such terms as lacking any evidentiary support.

In contrast, BellSouth’s witness on this issue, Mr. Fogle, demonstrated the need for BellSouth’s contract language, which involves a CLEC purchasing a stand-alone loop (the whole loop) and providing its own splitter in its central office leased collocation space, and then sharing the portion of the loop frequency not in use with a second CLEC.³⁵⁴

If the Authority chooses to compare the contract language despite CompSouth’s lack of any evidentiary support, any such comparison should result in the adoption of BellSouth’s proposed language. CompSouth includes language that would require BellSouth to provide line

³⁵¹ 47 C.F.R. § 51.5

³⁵² Fogle Rebuttal at 3

³⁵³ TRO at ¶ 251, *Line Sharing Reconsideration Order* at ¶ 33, Gillan Deposition, Hearing Exhibit 4 at 77

³⁵⁴ Fogle Direct at 9 – 10

splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271; however, as explained above the Authority should not support the reincarnation of UNE-P and should not include any references to Section 271 in Section 251/252 interconnection agreements. Moreover, the loop described by CompSouth does not exist, is not required by the FCC, and, therefore, should not be included in the section of the ICA that addresses line splitting.³⁵⁵

CompSouth also proposes that BellSouth be obligated to provide splitters between the data and voice CLECs that are splitting a UNE-L; however, as Mr. Fogle made clear, splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by utilizing the integrated splitter built into all Asynchronous Digital Subscriber Line (“ADSL”) platforms.³⁵⁶ The CLECs offered no contrary evidence. BellSouth should not be obligated to provide the CLECs with splitters when they are utilizing UNE-L and can readily provide this function for themselves.³⁵⁷

The final area of competing contract language concerns CompSouth’s proposed OSS language. The dispute between the parties is not over the language contained in the federal rules – clearly, the federal rules require BellSouth to make modifications to its OSS necessary for line splitting. The dispute between the parties revolves around the modifications that are actually “necessary.” Mr. Fogle has explained that CLECs do not need anything from BellSouth to facilitate line splitting.³⁵⁸ Again, the CLECs offered no contrary evidence.

Consequently, BellSouth cannot agree to the open-ended contract language that CompSouth has proposed. That language would create, rather than solve, issues between BellSouth and its CLEC customers. Since CompSouth has failed to explain in any detail the

³⁵⁵ Fogle Rebuttal at 8

³⁵⁶ Fogle Rebuttal at 8.

³⁵⁷ *Id*

³⁵⁸ Joint Exhibit 2 at 94

basis for its proposed language, the Authority should reject it and adopt BellSouth's language, which is clear and reasonable, in resolution of this issue.

C. Fiber and Broadband Unbundling:

1. Greenfield and Fiber To The Home

- i. **Issue 23: Greenfield Areas:** a) What is the appropriate definition of minimum point of entry ("MPOE")? b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?*
- ii. **Issue 28: Fiber To The Home:** What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?*

Relevant Contract Provisions: PAT-1 Sections 2.1.2, 2.1.2.1, 2.1.2.2, 2.1.2.3; PAT-2 Sections 2.1.2, 2.1.2.1, 2.1.2.2, 2.1.2.3

There is no dispute between BellSouth and CompSouth that the FCC has eliminated certain unbundling requirements concerning certain types of fiber loops.³⁵⁹ Indeed, when comparing the parties' proposed contract language, there are only two substantive differences, one minor, one major. The first, and minor difference, is that CompSouth has deleted BellSouth's Section 2.1.2.3, which states:

Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's

³⁵⁹ The Authority should be aware that Covad and other CLECs have filed petitions for reconsideration with the FCC of its *FTTC Reconsideration Order*. See FCC Docket Nos 01-338, 96-98, 98-147, petitions for reconsideration filed on January 28, 2005

standard Loop provisioning interval will not apply, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval

CompSouth did not offer any explanation for its deletion of BellSouth's proposed Section 2.1.2.3, hence, its deletion should be rejected by the Authority.³⁶⁰

The parties' major disagreement largely centers on the extent of fiber unbundling. The core dispute relates to the language that CompSouth substituted for BellSouth's proposed Section 2.1.2.3, which follows:

Notwithstanding the above, nothing in this Section shall limit BellSouth's obligation to offer CLECs an unbundled DS1 loop (or loop/transport combination) in any wire center where BellSouth is required to provide access to DS1 loop facilities.³⁶¹

CompSouth claims that its limitation is supported by the FCC's use of the terms "mass market" at various places in its orders; however, the language CompSouth has proposed does not appear in the binding federal rules, and should be rejected.³⁶²

In resolving this issue, the Authority needs to understand the FCC's various orders concerning fiber relief. The first order addressing fiber was the *TRO*, and the FCC stated at ¶ 273:

Requesting carriers are not impaired without access to FTTH loops, although we find that the level of impairment varies to some degree depending on whether such loop is a new loop or a replacement of a pre-existing copper loop. With a limited

³⁶⁰ Fogle Rebuttal at 10

³⁶¹ The Authority should not accept CompSouth's proposed language, as explained more fully below. If, however, the Authority entertained any aspect of CompSouth's language (it should not) and inserted a DS1 loop or DS1 EEL limitation, it should make clear that BellSouth would have no obligation to provide a DS1 loop or DS1 EEL provided over a FTTH or FTTC loop to a *residential customer*. Mr. Gillan conceded as much in his deposition but subsequently reneged on this agreement during the Tennessee Hearing.

Q Would you agree that if, for some reason, a residential customer ordered a DS1 loop, that – and it's a Greenfield loop, that we would have no obligation to provide a DS1 loop in that circumstance?

A I'm going to give you a conditional yes, subject to checking the order in more detail. But I do believe that every time that the FCC referred to the enterprise market, it used the business enterprise market as part of the definition. So I think that that's an accurate statement.

Gillan Deposition, Hearing Exhibit 4 at 81

³⁶² See 47 C.F.R. § 51.319(a)(3)

exception for narrowband services, our conclusion applies to FTTH loops deployed by incumbent LECs in both new construction and overbuild situations. Only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops must the incumbent LEC offer unbundled access to those fiber loops, and in such cases the fiber loops must be unbundled for narrowband services only. Incumbent LECs do not have to offer unbundled access to newly deployed or “greenfield” fiber loops.

Although the FCC used the terms “mass market” at various other places in the *TRO*, it did not use those words in explaining the scope of its fiber relief, and the FCC was very clear that its “unbundling obligations and limitations for such loops do not vary based on the customer to be served.”³⁶³ Indeed, the FCC recognized clearly that CLECs “are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation.”³⁶⁴

The FCC extended its fiber relief in subsequent orders. In its *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*,³⁶⁵ the FCC made clear that BellSouth is not obligated to unbundle fiber loops serving predominantly residential multiple dwelling units (“MDUs”).³⁶⁶ The FCC also explained that, to the extent fiber loops serve MDUs that are predominantly residential in nature, such loops are governed by the FTTH rules.³⁶⁷ “General examples of MDUs include apartment buildings, condominium buildings, cooperatives, or planned unit developments.”³⁶⁸ The FCC further stated that the existence of businesses in MDUs does not exempt such buildings from the FTTH unbundling framework established in the *TRO*. For instance, the FCC stated that “a multi-level apartment that houses retail stores such as a dry cleaner and/or a mini-mart on the ground floor is

³⁶³ *TRO* at ¶ 210

³⁶⁴ *TRO* at ¶ 275

³⁶⁵ CC Docket No 01-338, FCC 04-191 (Aug 9, 2004) (“*MDU Reconsideration Order*”)

³⁶⁶ *MDU Reconsideration Order* at ¶ 7

³⁶⁷ *Id* at 4

³⁶⁸ *Id* at ¶ 4

predominantly residential, while an office building that contains a floor of residential suites is not.”³⁶⁹ In its concluding paragraphs, the FCC acknowledged that its rule “will deny unbundling to competitive carriers seeking to serve customers in predominantly residential MDUs” but found that “such unbundling relief was necessary to remove disincentives for incumbent LECs to deploy fiber to these buildings”³⁷⁰

Following its *MDU Reconsideration Order*, the FCC next addressed the topic of fiber loops in its *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (“FTTC Reconsideration Order”)*.³⁷¹ The FCC defined a FTTC loop is a “fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer’s premises.”³⁷² Then, the FCC granted further unbundling relief, concluding that “requesting carriers are not impaired in greenfield areas and face only limited impairment without access to FTTC loops where FTTC loops replace pre-existing loops.”³⁷³ Significantly, the FCC reiterated that CLECs have increased revenue opportunities available with FTTC loops and that the entry barriers for CLECs and ILECs were “largely the same.”³⁷⁴ The FCC again concluded that its rule modification “will relieve the providers of such broadband loops from unbundling obligations under section 251 of the Act.”³⁷⁵

Despite all of these orders, CompSouth’s proposed contract language would require BellSouth to provide access to its FTTH or FTTC DS1 loops or DS1 EELs. The Authority must reject this language as flatly contradictory to the FCC’s broadband policies, its fiber orders, and the applicable rule.

³⁶⁹ *Id*

³⁷⁰ *Id* at 23

³⁷¹ CC Docket No 01-338, FCC 04-248 at ¶¶ 1, 9 (Oct 18, 2004).

³⁷² *FTTC Reconsideration Order* at ¶ 10

³⁷³ *Id* at 11

³⁷⁴ *Id* at 12

³⁷⁵ *Id* at 32

BellSouth is aware of two state commission decisions have addressed this issue, both of which are consistent with BellSouth's position. The Michigan Commission found as follows:

The Commission finds that the Joint CLECs' proposal to include a limitation for the definition of FTTH, FTTC, and hybrid loops should be rejected. First, the Commission notes that there is no language within the FCC rule defining these loops that would so limit the definitions. Further, the Commission notes that in the *TRO*, the FCC stated that although it was adopting rules specific to each loop type, its determination concerning unbundling obligations and limitations for such loops do not vary based on the customer to be served. Therefore, the Commission is persuaded that the FCC did not create an ambiguity in its rules by not including the "mass market customer" limitation proposed by the Joint CLECs.³⁷⁶

The Massachusetts Department of Telecommunications and Energy reached a similar conclusion:

CLECs argue that the FCC's intent to limit the unbundling relief to loops used to serve mass market customers can be found in the context of the relevant orders Although [CLECs are] correct that the FCC included its discussion of FTTH loops under the heading "Mass Market Loops," the FCC emphasized elsewhere in the *[TRO]* that while the FCC adopts loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served. Therefore, the Department determines that the FCC did not intend to limit FTTP, FTTC, or FTTH unbundling relief only to those loops being used to provide service to residential customers.³⁷⁷

In a final effort to flout the federal rules, CompSouth will likely argue that its Hearing Exhibit 16 – a brief the FCC filed *after* the *TRO* but *before* the issuance of its *MDU Reconsideration Order* and its *FTTC Reconsideration Order* – supports its proposed contract language. This argument has no merit.

The FCC stated, on appeal to the D.C. Circuit, that

[t]here is not a hard-and-fast definition of whether a particular customer is a 'mass market' or an 'enterprise' customer; those categories are based on general characteristics of the types of communications services customers typically demand and were used as descriptive tools to guide the analysis.³⁷⁸

³⁷⁶ *Michigan Order*, p 6 – 7

³⁷⁷ *Massachusetts Arbitration Order*, p 177.

³⁷⁸ CompSouth Exhibit 1 at 6

Consequently, CompSouth has no legitimate basis to insert a limitation to the FCC's fiber relief. Likewise, the FCC confirmed that in the *TRO* it "found that CLECs would suffer no impairment without access to ILEC FTTH loops" because "ILECs face roughly the same costs in deploying fiber loops as CLECs, and therefore are not at a cost disadvantage"; "FTTH loops are still in the very beginning stages of deployment, so there is not a large embedded base of ILEC FTTH loops that gives ILECs a significant head start advantage"; and "CLECs are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation."³⁷⁹

BellSouth's proposed contract language is fully consistent with applicable FCC rules and orders and should be approved.

2. **Issue 24: Hybrid Loops:** *What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?*

Relevant Contract Provisions: PAT-1 Section 2.1.3; PAT-2 Section 2.1.3

Hybrid loops are defined in the federal rules, and BellSouth and CompSouth do not appear to contest that it is appropriate to include the language contained in such rules in interconnection agreements, whether that language is a shortened version of the rules, as BellSouth proposes, or the federal definition in its entirety.³⁸⁰ Either alternative is acceptable. What is not acceptable is CompSouth's proposed language to require BellSouth to provide access to hybrid loops as a Section 271 obligation.³⁸¹ As BellSouth has previously explained, the Authority should not include any Section 271 language in Section 252 interconnection agreements; thus CompSouth's proposed language should be rejected.

³⁷⁹ *TRO* at ¶ 275

³⁸⁰ See BellSouth Exhibit 10 and 11

³⁸¹ Fogle Rebuttal at 10

D. Routine Network Modification Issues

1. **Issue 26:** *What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?*
2. **Issue 27:** *What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?*

Relevant Contract Provisions: – PAT-1 Section 1.10; PAT-2 Section 1.10

BellSouth's proposed contract language refers to the applicable federal rules concerning routine network modifications ("RNM") to unbundled loop facilities.³⁸² The parties' dispute centers on the relationship between RNM and line conditioning, which is properly seen as subset of RNM.³⁸³ CompSouth also improperly attempts to limit BellSouth's cost recovery to TELRIC rates, even if BellSouth performs work that it would not typically perform for its retail customers.

The FCC has defined RNMs as "those activities that incumbent LECs regularly undertake for their own customers."³⁸⁴ RNMs do not include the construction of new wires (*i.e.* installation of new aerial or buried cable).³⁸⁵ The FCC, citing the United States Supreme Court, recognizes that BellSouth does not have an obligation to "alter substantially [its] network[] in order to provide superior quality interconnection and unbundled access."³⁸⁶ Thus, an ILEC has to make the same RNMs to their existing loop facilities for CLECs that they make for their own customers.³⁸⁷ As stated by the FCC,

[b]y way of illustration, we find that loop modification functions that the incumbent LEC routinely performs for their own customers, and therefore must

³⁸² Fogle Direct at 23

³⁸³ *Id.* at 25

³⁸⁴ *TRO* at ¶ 632

³⁸⁵ *Id.*

³⁸⁶ *TRO* at ¶ 630 (quoting, *Iowa Util Bd v FCC*, 120 F 3d 753, 813 (8th Cir 1997))

³⁸⁷ *TRO* at ¶ 633

perform for competitors, include, but are not limited to, rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer.³⁸⁸

The FCC described these and other activities that would constitute RNMs as the “‘routine, day-to-day work of managing an [incumbent LEC’s] network.’”³⁸⁹

The D.C. Circuit in *USTA II* interpreted the FCC’s RNM requirements in the *TRO*. The Court’s analysis is entirely consistent with BellSouth’s position on this issue.

The ILECs claim that these passages manifest a resurrection of the unlawful superior quality rules. We disagree. *The FCC has established a clear and reasonable limiting principle: the distinction between a ‘routine network modification’ and a ‘superior quality’ alteration turns on whether the modification is of the sort that the ILEC routinely performs, on demand, for its own customers.* While there may be disputes about the application, the principle itself seems sensible and consistent with the Act as interpreted by the Eighth Circuit. Indeed, the FCC makes a plausible argument that requiring ILECs to provide CLECs with whatever modifications the ILECs would routinely perform for their own customers is not only allowed by the Act, but is affirmatively demanded by § 251(c)(3)’s requirement that access be “nondiscriminatory.”³⁹⁰

It is clear that, despite CLECs’ attempts to distinguish line conditioning from RNM, the FCC draws no such line. In paragraph 643 of the *TRO*, the FCC stated that “line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers.”³⁹¹ The FCC went on further to state that “incumbent LECs must make the routine adjustments to unbundled loops to deliver services *at parity* with how incumbent LECs provision such facilities for themselves” and that “line conditioning is a term or condition that incumbent LECs apply to their provision of loops

³⁸⁸ *Id.* at 634 (footnotes omitted)

³⁸⁹ *Id.* at 637

³⁹⁰ *USTA II*, 359 F.3d at 578 (emphasis added)

³⁹¹ *TRO* at ¶ 643

for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations.”³⁹²

In its discussion of routine network modifications, the FCC expressly equated its routine network modification rules to its line conditioning rules in the *TRO*: “In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules.”³⁹³ The FCC echoed these sentiments in paragraph 250 of the *TRO*:

As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier’s request to ensure that a copper local loop is suitable for providing xDSL service.³⁹⁴

The Florida Commission recently addressed this issue, finding that that BellSouth’s RNM and line conditioning obligations were to be performed at parity.³⁹⁵ Under this ruling, BellSouth is not obligated, to remove at TELRIC rates, load coils on loops greater than 18,000 feet.³⁹⁶ Likewise, the Florida Commission held that BellSouth’s obligation to remove bridged taps was to provide parity access.³⁹⁷

With respect to Issue 27, BellSouth’s position is straightforward – if BellSouth is not obligated to perform a RNM, such as removing load coils on loops that exceed 18,000 feet or removing bridged taps, then the appropriate rate is not TELRIC, it is a commercial or tariffed rate.³⁹⁸ In contrast, CompSouth’s proposed language limits BellSouth’s recovery to TELRIC rates, even if the activity the CLEC is requesting was not included in the establishment of that

³⁹² *Id* (emphasis added)

³⁹³ *TRO* at ¶ 635.

³⁹⁴ *TRO* at ¶ 250

³⁹⁵ See Order No PSC-05-0975-FOF-TP at 24 – 26

³⁹⁶ *Id* at 36 – 37

³⁹⁷ *Id* at 41

³⁹⁸ Fogle Direct at 26 – 27

rate.³⁹⁹ CompSouth, however, failed to provide any rationale or explanation for this limitation, and, the Authority must reject it. Indeed, as BellSouth makes clear, it has no objection to performing non-standard modifications if CLECs insist upon such changes – however, BellSouth is entitled to be fully compensated for doing so.⁴⁰⁰

BellSouth's proposed contract language is fully consistent with applicable FCC rules and should be approved.

CONCLUSION

This docket requires the TRA to make the decisions that will implement, not undermine, the decisions of the FCC. The FCC has already weighed evidence and considered legal arguments in deciding to de-list many UNEs. The FCC reached those decisions because the facts and law demonstrated that the old regulatory regime for UNEs was hindering the real competition Congress wanted to achieve.

The CLECs have taken every opportunity to coax state commission to undo what the FCC has done. The CLECs have concocted a strained theory about 271 that would conveniently get rid of all of the FCC's decisions that the CLECs do not like. In Tennessee, moreover, the CLECs have attempted, using the interim DeltaCom arbitration decision on market based switching, to argue that the TRA has already adopted and accepted the 271 argument. More than anything else in the hundreds of pages of BellSouth's briefs and testimony in this docket, BellSouth stresses that the DeltaCom case is not the dispositive precedent that the CLECs contend it is. It is a 2-1 decision, which was reached more than a year ago in recognition that further developments on these issues would follow as the TRO and TRRO matters progressed. Moreover, Director Tate correctly recognized in that docket that only a negotiated rate can really

³⁹⁹ Fogle Rebuttal at 16

⁴⁰⁰ Fogle Direct at 28

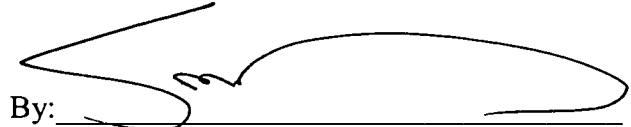
fulfill the FCC's call to reach commercial, market-based rates. When the issue was raised in this docket as a basis for the TRA to set aside the FCC's deadline for No New Adds, Director Kyle flatly rejected the 271-based argument because it was not consistent with the FCC's clear language and its decisions and efforts to bring about facilities-based competition. Director Kyle's view ultimately prevailed, and the entire panel ultimately cast its votes to end new adds – even though the CLECs had raised precisely the 271-based arguments that they have raised on the remaining issues in this docket.

The bottom line is that the CLECs' 271 argument flies in the face of the FCC. The FCC clearly did not intend to have its critical changes in telecommunications regulation ignored and to have business continue largely as before but merely under a different statute. No one can seriously contend that all of the FCC's work amounts to nothing more than changing the number from 252 to 271 in all of our briefs and petitions – but doing business the same as before, through commission-set rates for these elements. Instead it is clear that the FCC intends these decisions to get out of the commission hearing rooms and to be made instead at the companies' negotiating tables.

BellSouth's proposed contract language respects and implements the FCC's changes, and the CLECs' language (based on their 271 theory) simply pays lip service to the change but allows business to go on as if nothing had changed at all.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

R. Douglas Lackey
Andrew D. Shore
Meredith E. Mays
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375

Recommendations: While the Joint Petitioners correctly state that the *TRRO* directs ILECs and CLECs to implement the *TRRO* changes pursuant to section 252 of the Act, which requires negotiations and/or arbitration, ¹ I do not agree this applies to "new adds". I am of the opinion that when the *TRRO* is read in total, there are no rates, terms or conditions to be negotiated concerning new adds because the FCC expressly prohibited new adds after March 11, 2005, which has past. In short, there is nothing to negotiate in those instances where new adds are involved and where the FCC has found CLECs are not impaired if a UNE is not provided by the incumbent. This applies to mass market switching everywhere and also to DS1 & DS3 transport, dark fiber transport and high capacity loops in cases where the FCC has determined no impairment exists. To implement the commissions rules BellSouth may withdraw access to new adds, where no impairment exists, anytime after March 11, 2005. At that point, the only portion of the rules left to implement are those associated with the transition of the embedded base.

The FCC could very easily have said that new add UNE-Ps must continue to be provided consistent with the parties interconnection agreements or have provided a plan for the parties to transition away from mass market local switching new adds similar to the transition plan for the embedded base. This FCC did not do this. Therefore, I believe that the FCC did not intend for local circuit switching to be unbundled after March 11, 2005.

Both Cinergy and MCI assert that section 271 of the Federal Act independently supports the right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the agreement. ² Therefore, they argue that even if BellSouth were empowered by the *TRRO* to unilaterally change their rights to obtain UNE-P pursuant to section 251(c)(3), BellSouth would not be entitled to change the unbundling and UNE rate sections of their agreements unilaterally. In addition, MCI argues that BellSouth must continue to provide UNE-P under Tennessee law. ³ I disagree. In my opinion, Section 271 of the Federal Act does not allow a network element obtained pursuant to that section to be combined with any other 251 UNE. Section 271(c)(1)(B) contains the competitive checklist that specifies the network elements that are required to be provided by ILECs to CLECs. The list includes local loop transmission unbundled from local switching or other services, local transport unbundled from switching or other services and local switching unbundled from transport, local loop transmission or other services. Clearly, these network elements are to be provided unbundled from other services or network elements. The FCC did not require that these elements be made available combined with other services or elements. While I

¹ Joint Petitioner's *Motion for Emergency Relief*, ¶ 16.. (February 25, 2005).

² *Cinergy's Motion*, p. 10, ¶ 20 (March 2, 2003) and *MCI's Motion*, p 14, ¶ 36 (March 2, 2005).

³ *MCI's Motion*, p.11, ¶ 28 (March 2, 2005).

believe BellSouth is required to provide section 271 network elements to CLECs, BellSouth is only required to provide them at rates that are just and reasonable and unbundled from other services and network elements. Therefore, BellSouth is not required to provide combinations of 271 and 251 elements pursuant to paragraph 584 of the *TRO*.⁴

Additionally, I disagree with MCI that BellSouth is required to provide UNE-P under state law and therefore cannot unilaterally change the unbundling and rate sections of the agreement. While MCI is correct that its agreement with BellSouth⁵ was approved by the Authority in part based on T.C.A. § 65-4-104 and T.C.A. § 65-4-123,⁶ I believe MCI misses the mark. In addressing MCI's ability to use BellSouth's property which had been conveyed to a third party the Authority found pursuant to T.C.A. § 65-4-123 that BellSouth should not enter into contracts that do not recognize license agreements with MCI. Let me also state that I did not agree with the final determination in this issue. The order of this Authority in Docket 00-00309, dated September 20, 2002, specifically states "The Authority has jurisdiction over public utilities pursuant to Tenn. Code Ann §65-4-104". This finding is consistent with our general supervisory control of public utilities under state statute.

For all the reasons given, I am of the opinion that BellSouth's responsibility to continue to furnish the UNEs exempted by the *TRRO* ended on March 11, 2005. BellSouth is still providing those UNEs pursuant to the existing agreements and has stated it will continue to do so until the earlier of a decision by a convening authority or April 17, 2005. While it is possible that the parties could come to some negotiated agreement within a period of time set by the Authority, past history has shown that such negotiations can take far longer than 90 days. From a practical point of view, the parties could spend such time negotiating, fail to reach agreement and the CLECs file another emergency motion at the end of the negotiating period. Action of this sort would introduce unnecessary delay into a process the FCC intended to move swiftly. Such delay would do nothing more than hinder the rapid advancement of facility based competition the FCC intended. If the CLECs did not have other alternatives it would be different. I am convinced that the CLECs are not unreasonably prejudiced since the FCC provided other alternatives for the CLECs in the form of building their own facilities, leasing the network of other CLECs or through the use of tariffed services offered by BellSouth. Therefore, BellSouth is not required to furnish mass market switching and DS1 and DS3 transport, dark fiber transport and high capacity loops "new adds" UNEs exempted by the *TRRO* after April 17, 2005 and

⁴ *BellSouth's Response to Cinergy*, p. 15 (March 10, 2005) & *BellSouth's Response to MCI*, p. 14 (March 10, 2005)

⁵ *MCI's Motion*, pp.11-12, ¶ 28 (March 2, 2005).

⁶ *Id.*, p.12.

I so move. I also move that any negotiated rates, terms and conditions for the provision of such UNEs by BellSouth be trued up back to the March 11, 2005 date referenced in the *TRRO*.

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2005, a copy of the foregoing document was served on the following, via the method indicated:

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Henry Walker, Esquire
Boult, Cummings, et al.
1600 Division Street, #700
Nashville, TN 37219-8062
hwalker@boultcummings.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

James Murphy, Esquire
Boult, Cummings, et al.
1600 Division Street, #700
Nashville, TN 37219-8062
jmurphy@boultcummings.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Ed Phillips, Esq.
United Telephone - Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587
Edward.phillips@mail.sprint.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

H. LaDon Baltimore, Esquire
Farrar & Bates
211 Seventh Ave. N, # 320
Nashville, TN 37219-1823
don.baltimore@farrar-bates.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

John J. Heitmann
Kelley Drye & Warren
1900 19th St., NW, #500
Washington, DC 20036
jheitmann@kelleydrye.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Charles B. Welch, Esquire
Farris, Mathews, et al.
618 Church St., #300
Nashville, TN 37219
cwelch@farrismathews.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Dana Shaffer, Esquire
XO Communications, Inc.
105 Malloy Street, #100
Nashville, TN 37201
dshaffer@xo.com

